LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ, PETITIONER,

v.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JULY 7, 1962
CERTIORARI GRANTED OCTOBER 15, 1962

INDEX

		Page
Relevant Docket Entries		1
Indictment		2
Defendant's Petition and Motion to Suppress Evidence		5
Defendant's Motion for Judgment for the defendant on Counts 2, 3 and 4 of the indictment, notwithstanding the jury's verdict of guilty on said counts		6
Judgment and Sentence of Defendant on Counts 2, 3 and 4		6
Notice of Appeal		7
Judgment of acquittal of Defendant on Count 1		8
Stenographic transcript of trial:		
Testimony of:		
Roger S. Davis,	Direct	9
	Cross	24
	Redirect	62
	Recross	63
Joseph Boise,	Direct	63
William F. O'Brien,	Direct	64
Richard A. Callahan,	Direct	65
	Cross	79
Government's Exhibit 6		80
Testimony of:		
Emanuel M. Schuster,	Direct	95
	Cross	97
German S. Lopez,	Direct	101
	Cross	117
Homer J. Dion,	Direct	118
	Cross	122
Irene Lopez,	Direct	123
Marsha Davis,	Direct	126
Charge to the Jury		126
Verdict		126

		Page
Stenographic transcript of hearing re Petition and Motion of Defendant to Suppress Evidence		137
Testimony of:		
Roger S. Davis,	Direct	138
Edward J. Pelletier,	Direct	150
German S. Lopez,	Direct	153
Defendant's Exhibit:		
A—Floor plan of Clauson's Inn		167
D—Page from general journal		168

	Original	Print
Proceedings in United States Court of Appeals for the First Circuit	170	170
Appendix to appellee's brief consisting of excerpts from the record of testimony from the U.S.D.C. for the District of Massachusetts	170	170
Opinion, per curiam	183	182
Judgment	184	183
Clerk's certificate (omitted in printing)	185	183
Order allowing certiorari	186	184

Criminal Docket Cr. 61-307-W

THE UNITED STATES

v.

GERMAN S. LOPEZ

Bribery and Graft 18 USC 201

RELEVANT DOCKET ENTRIES

1961

Nov. 8 Indictment returned

24 WYZANSKI, J. Deft. arr. and pleaded not guilty. Ordered to recognize in the sum of $1000. without security.

14 Deft's petition and motion to supress evidence filed a/s

1962

Jan. 17 WYZANSKI, J. Hearing on defendant's petition and motion to suppress evidence –motion denied. Trial Jan. 29, 1962

29 WYZANSKI, J. Defendant set to the bar to be tried. Jury impanelled and sworn; evidence

30 WYZANSKI, J. Trial continues; evidence; both sides rest.

31 WYZANSKI, J. Trial continues; arguments; charge.—committed to jury. Jury returned verdict—Count I not guilty; Count 2, 3, and 4 guilty. Disposition Wednesday, February 14, 1962 at 9:30A.M. Bail Continued.

Feb. 6 Motion for judgment for the deft. on counts 2, 3 and 4 of the indictment, notwithstanding the jury's verdict filed.

14 WYZANSKI, J. Deft. sentenced to a period of imprisonment for one year.

15 WYZANSKI, J. Judgment entered. Copy to Asst. US Atty Madden, Edward J. Davis, Esq. 11 Pemberton Sq., Boston and probation office.

1962

20 Notice of Appeal filed by Deft. cy to Mr. Madden
21 Stmt docket entries with cy N/A delivered to Court of Appeals.
26 WYZANSKI, J. 1. On Jan. 29, 1962 came the Asst. US. Atty.; deft and deft's attorney 2. deft having been set to the bar to be tried by the Court and jury and 3. the jury having found the defendant not guilty of the offense charged in count 1 it is 4. ORDERED that the deft be & hereby is discharged on count 1.
Judg. of acquittal entered. Copy to Asst. U. S. Atty. Madden, 1107 Federal Bldg. Boston and Edward J. Davis, Esq., 11 Pemberton Sq., Boston

---

INDICTMENT No. 61-307-W

The grand jury charges:

COUNT ONE

That on or about October 21, 1961 at North Falmouth in the District of Massachusetts, GERMAN S. LOPEZ of Hatchville in said District, did give money totalling Four Hundred Twenty Dollars ($420.00) to Roger S. Davis, an employee acting for and on behalf of the Treasury Department of the United States in his official function as Revenue Agent in the Internal Revenue Service, Department of the Treasury, under authority of such Department, said Lopez well knowing that said Roger S. Davis was then and there a Revenue Agent in the Internal Revenue Service of the Treasury Department of the United States acting in his official capacity as such Revenue Agent, with intent to induce said Davis to omit to do an act in violation of his lawful duty, to wit: to refrain from making an examination of the books and records relating

to sales and receipts of the bar and lounge at Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960 and the first two quarters of the year 1961, from computing a cabaret tax on said sales and receipts, and from reporting same to the Internal Revenue Service.

All in violation of Title 18, U.S.C. Section 201.

The grand jury further charges:

COUNT TWO

That on or about October 24, 1961 at North Falmouth in the District of Massachusetts, GERMAN S. LOPEZ of Hatchville in said District, did give money totalling Two Hundred Dollars ($200.00) to Roger S. Davis, an employee acting for and on behalf of the Treasury Department of the United States in his official function as Revenue Agent in the Internal Revenue Service, Department of the Treasury, under authority of said Department, said Lopez well knowing that said Roger S. Davis was then and there a Revenue Agent in the Internal Revenue Service of the Treasury Department of the United States and acting in his official capacity as such Revenue Agent, with intent to influence him to aid in committing a fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter.

All in violation of Title 18, U.S.C. Section 201.

The grand jury further charges:

COUNT THREE

That on or about October 24, 1961 at North Falmouth in the District of Massachusetts, GERMAN S. LOPEZ of Hatchville in said District, did promise money totalling

approximately Two Hundred Dollars ($200.00) to be paid on or about November 24, 1961 to Roger S. Davis, an employee acting for and on behalf of the Treasury Department of the United States in his official function as Revenue Agent in the Internal Revenue Service, Department of the Treasury, under authority of such Department, said Lopez well knowing that said Roger S. Davis was then and there a Revenue Agent in the Internal Revenue Service of the Treasury Department of the United States acting in his official capacity as such Revenue Agent, with intent to influence him to aid in committing a fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter.

All in violation of Title 18, U.S.C. Section 201.

The grand jury further charges:

COUNT FOUR

That on or about October 24, 1961 at North Falmouth in the District of Massachusetts, GERMAN S. LOPEZ of Hatchville in said District, did promise a thing of value, to wit: an expense-paid weekend accommodation for Roger S. Davis, his wife and family, at the Honeymoon Cottage, Clauson's Inn, North Falmouth, Massachusetts, to said Roger S. Davis, an employee acting for and on behalf of the Treasury Dpartment of the United States in his official function as Revenue Agent in the Internal Revenue Service, Department of the Treasury, under authority of said Department, said Lopez well knowing that said Roger S. Davis was then and there a Revenue Agent in the Internal Revenue Service of the Treasury Department of the United States and acting in his official capacity as such Revenue Agent, with intent to influence him to aid in committing a

fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter.

All in violation of Title 18, USC. Section 201.

DEFENDANT'S PETITION AND MOTION TO SUPPRESS EVIDENCE.

1. The defendant in the above case, German S. Lopez, represents that on October 24, 1961, as a lessee of restaurant facilities was conducting a restaurant and cocktail lounge business serving food and liquor on premises known as Clawson's Inn, at Falmouth, Massachusetts. Included in the premises was the defendant's private office where the defendant conducted his business affairs in private.

2. On October 24, 1961 United States Internal Revenue Agent Roger Davis, referred to in the indictment and United States Internal Revenue Agents Pelletier and Callahan came to the vicinity of the said Clawson's Inn about 12:00 noon. While Agents Pelletier and Callahan remained in an automobile in the vicinity, Agent Davis entered the building known as Clawson's Inn. The said Agents Pelletier and Callahan at the time were operating a recording device to record conversation of Agent Davis with the defendant in the building, the conversation being transmitted by Davis by a device from within the building.

Agent Davis entered the Cocktail Lounge in the building and asked the defendant if they could go to the office of the defendant in the building to talk. Permission was so granted and Agent Davis and the defendant went into the office and a conversation ensued. This conversation was recorded by the devices aforesaid and was used in connection with obtaining the indictment in the case.

3. The defendant says that the conversation so recorded was illegally obtained and in violation of the defendant's rights under the United States Constitution.

Wherefore your petitioner prays that an order be entered restraining the United States Attorney from using as evidence in any criminal proceeding against the defendant any and all statements recorded by said device at said time and place predicated upon the use of said device.

Defendant. By his attorney
(s) EDWARD J. DAVIS
11 Pemberton Square
Boston, Mass.

WYZANSKI J.
Jan. 5, 1962
By the Ct: after argument in open Ct.
Motion Denied
(s) W. J. LYONS, *Dep. Clk*

DEFENDANT'S MOTION FOR JUDGMENT FOR THE DEFENDANT ON COUNTS 2, 3 AND 4 OF THE INDICTMENT, NOTWITHSTANDING THE JURY'S VERDICT OF GUILTY ON SAID COUNTS

And now comes the defendant and moves that the Court order entry of judgment for the defendant on Counts 2, 3 and 4 of the Indictment, notwithstanding the Jury's verdict of Guilty on said Counts, as a matter of law on the evidence.

Defendant, By His Attorney
(s) EDWARD J. DAVIS

JUDGMENT AND COMMITMENT

No. 61-307-W

On this 14th day of February, 1962 came the attorney for the government and the defendant appeared in person and by counsel

It Is ADJUDGED that the defendant has been convicted

upon his plea of not guilty and a verdict of guilty of the offense of bribery and graft, in violation of 18 U.S.C. 201, as charged in counts 2, 3 and 4 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year.

It Is Adjudged that

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) C. Wyzanski
United States District Judge.

The Court recommends commitment to:

Clerk

NOTICE OF APPEAL

Appellant—German S. Lopez

Address of Appellant—35 Alderberry Lane, Falmouth, Massachusetts.

Appellant's Attorney—Edward J. Davis

Attorney's Address—11 Pemberton Square, Boston Massachusetts.

In the above-entitled case, on the 14th day of February, 1962, it was adjudged that the defendant "has been convicted upon his plea of not guilty and a verdict of guilty of the offense of bribery and graft, in violation of 18 U.S.C. 201, as charged in counts 2, 3 and 4".

On said date, it was further adjudged "that the defendant is guilty as charged and convicted".

On said date, it was adjudged "that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year", and on motion of the defendant, stay of execution of judgment was granted pending appeal.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the First Circuit from the above-stated judgment.

Dated: February 20, 1962

(s) EDWARD J. DAVIS
Attorney for appellant.

JUDGMENT OF ACQUITTAL

WYZANSKI, J.

1. On January 29, 1962 came the Assistant United States Attorney and the defendant, German S. Lopez appeared in person and by counsel and
2. The defendant having been set to the bar to be tried by the Court and jury for the offense of trying to influence and Internal Revenue Agent to refrain from making an examination of the books and records relating to sales and receipts and from reporting the same to the Internal Revenue Service.
3. and the jury having found the defendant not guilty of the offense charged in count I, it is
4. ORDERED that the defendant be and hereby is discharged on count I.

By the Court,
(s) MIRIAM M. WYNN
Deputy Clerk.

(s) WYZANSKI
U.S.D.J.
Judgment of acquittal
entered—February 26, 1962

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No. 61-307-W WYZANSKI, D.J.

UNITED STATES OF AMERICA
v.
GERMAN S. LOPEZ

APPEARANCES:

W. Arthur Garrity, Jr., United States Attorney, by William C. Madden, Esq., Assistant United States Attorney, for the Government.
Edward J. Davis, Esq., for the defendant.

Court Room No. 6
Federal Building
Boston, Massachusetts
January 29, 1962.

* * *

[6] ROGER S. DAVIS, SWORN

Direct Examination by Mr. Madden

Q. Will you please state your full name. A. Roger S. Davis.

Q. Where do you reside? A. 8 Catherine Road, Framingham, Massachusetts.

* * *

[8] German S. Lopez? A. I did.

Q. Will you state that conversation? A. Having identified myself as an Internal Revenue Agent, I asked Mr. Lopez if there was any dancing or entertainment in the lounge and bar during the evening, and he replied No. I asked him if he was aware of advertisements which held the Inn out as furnishing entertainment or dancing in the evening. He said No. I then showed him a copy of the Cape Cod Guide, which is a local publication, and pointed out an advertisement which stated that Clauson's Inn had dancing and

entertainment evenings. He stated that he was not responsible for this advertisement.

I asked him to view the premises of the bar and lounge, and he agreed to let me. I did, and while I was viewing the premises—the bar and lounge, Mr. Lopez left the premises. When I returned from the bar and lounge, I tried to reach him, and I could not, and I left.

Q. I show you a copy of the Cape Cod Guide, dated August 26, 1961, and ask you whether or not this is the Cape Cod Guide that you showed on that occasion to Mr. Lopez. A. Yes, it is.

Q. And did you direct his attention to page 16, the advertisement reading: Clauson's Inn and Country Club. [9] Visitors to the Cape are invited to join us for luncheon, cocktails, dinner, dancing and entertainment. Our 18 Championship Golf Course is open daily to all. Electric carts available. North Falmouth, Mass. Locust 3-5926. A. I did.

Q. And did Mr. Lopez read this advertisement? A. Yes, he did.

The Court: Admitted as Exhibit 1. Let Mr. Moore give it to the Jury.

(Advertisement in Cape Cod Guide, dated August 26, 1961, marked government's Exhibit 1.)

Q. Now referring to the evening visit that you made to Clauson's Inn on August 31, 1961, what occurred on that visit? A. During the evening, while in the bar and lounge, I observed dancing to the music of a juke box. There was also on that evening a piano player. And in the premises there was a space cleared where some of the patrons were dancing. However, I didn't—Mr. Lopez was not on the premises when I asked for him, and I left.

Q. Did you make a report of this visit to the Internal Revenue Service? A. Yes, I did.

Q. To whom did you make this report? [10] A. To Mr. William Carr, the Acting Group Supervisor.

Q. When did you make the report? A. On September 1, 1961.

Q. Thereafter, did you again visit Clauson's Inn? A. Yes, I did.

Q. I show you a report, dated September 1, 1961, addressed to William M. Carr, Acting Group Supervisor, from R. S. Davis, Subject: Cabaret surveillance, August 31, 1961. 1. Clauson's Inn, potential delinquent, North Falmouth, bar and lounge. Trio plays six nights. Jazz concert Sundays. When Trio plays there is some dancing although management claims that it does not allow such dancing. Will follow up. I ask you whether or not this is a report that you made to William M. Carr, the acting group supervisor? A. Yes, it is.

The Court: Exhibit 2.

(Report dated September 1, 1961, from R. S. Davis to William M. Carr, marked government's Exhibit 2.)

Q. Now did you thereafter make another visit to Clauson's Inn? A. Yes, I did.

Q. When did this visit occur? A. October 21, 1961.

Q. What time of the day or evening? [11] A. Between 8.30 and 8.45 P.M.

Q. What was the purpose of this visit? A. To determine whether there was dancing or entertainment at Clauson's which would subject the establishment to a cabaret tax.

Q. What took place on this visit? A. I observed the premises while seated at the bar from 8.45 to about 9.15, during which time there were several patrons dancing to the music of a three piece trio. A waitress also got up and sang one song. About 9.15 I left the bar and lounge to see if Mr. Lopez was on the premises.

Just as I left the lounge, I met him, and I identified myself with my card, my commission, and stated my name, and he stated that he remembered me. I asked Mr. Lopez to

step into the lounge with me. He did. And I pointed out that there was dancing going on in the lounge.

He said that they tried to discourage it. I pointed out that it did not appear to me that anyone was trying to discourage the patrons at that time.

I stepped back into the lounge with him, and we sat down, and he related to me the details of the operation of the bar and lounge, the he operated on a rental basis and that he paid seven percent of his receipts to Clauson's management, and that he had a trio there called the [12] Fair Weather Trio which played on Friday and Saturday nights and that he had a piano player on Tuesday, Wednesday and Thursday nights.

I pointed out that there was a juke box in the lounge and asked whether it was used at all when the band was having a break, and he said that it was.

He told me how he used the cash register, and I asked him whether he had ever filed any cabaret returns. He said that he had not. I also asked him how long he had been in business. He said about two and a half years.

I pointed out to him that there was dancing there, and since there was, in my opinion there would be a liability for a cabaret tax, since the law specified that dancing is a means where the liability for that tax is determined.

I asked him whether his books and records were at Clauson's, and whether it would be convenient for him to have an examination of his books and records there or in Boston since it appeared that an examination was necessary. He stated that his books were at Clauson's but he wished to avoid any aggravation—any inconvenience which might be associated with an examination of his records. I stated that I didn't anticipate that this would inconvenience him as long as his books and records [13] were in order and were made available to me. During the time we talked Mr. Lopez was interrupted twice, or two or three times.

And at about 9.45 the Trio took a break and entered the alcove, and Mr. Lopez suggested that we go to his office and continue our talk. We went into his office, and he took my name and wrote it down on a piece of paper, and I also told him what office I was from, the Boston office.

I said that in view of the fact that he had never filed any returns, under the law there would—if there was a tax due there would also be a penalty for non-filing.

He again stated that he wished to avoid this aggravation, and couldn't we reach some sort of agreement now. I said that we could not, that I had a job to do and that I would come back—try to come back next week so that he could file a prompt return for that current quarter, which expired, or which was due on October 31st, so as to avoid any penalty for the current quarter.

He said again that he wished to avoid any aggravation associated with this and that he wanted to reach an agreement at that time. I told him that I could not do anything further that night, that I had another appointment. He stated that he didn't wish to—he didn't want to [14] insult me and pausing he said further that wasn't this matter entirely up to me, and couldn't I drop the case if I wanted to?

I told him No, I could not, that I had a report on file of my earlier visit.

About that time he asked to be excused. He left the room and returned in about two or three minutes. He again stated that he didn't want to insult me, and that he didn't know whether to take me into his confidence or not. I did not answer.

He opened the safe which was beside his desk and he removed some money. It appeared that he counted it under his desk. And he placed the money on the desk near where I was sitting, and said to me, "You can drop this case. Here's $200. Buy your wife a present. And I'll have more

money for you at Christmas time. This is all I have now."

I told him to take the money back, that we would discuss this case next week, and that I had a job to do, which was to examine his books and records. He repeated the offer and said, "Go ahead. Take the money. Get your wife a present." And he added, "Why don't you bring your wife and family down here for a week as my guest and stay at Clauson's Inn. Relax and play golf."

I said that we couldn't—excuse me—I said that [15] I had a job to do, that it would be necessary for me to examine his books, and that we couldn't do anything about this case now.

I asked him how much his business was, and he said, "About $160,000 a year."

I asked him, "About what percentage of that would you say is sales in the bar and lounge?" And he said, "Forty percent." To which I answered, "Well, that's roughly about $60,000." I said, "What portion of your sales of $60,000 would you say is at night?" He said, "About half of that." So I said, "Well, at $30,000, which is half of $60,000, the ten percent tax would be $3,000, which is a substantial amount."

I pushed the money back to him and he took the $200, and he added some more bills to it, and placed a rubber band around the roll and pushed it back over the desk to me, and he said, "You take this money now."

I told him that I didn't want the money, to take it back, and that I would come back next week and we would discuss the whole case then.

He said I should, again, take the money now, that he didn't want any aggravation associated with an examination, that he didn't wish to be bothered filing any past tax returns for any past periods due going back to the time he was in business or started in business; [16] that if I came down on Tuesday he would file a return for the current

quarter—but I should take this money now. I told him again to take the money back, and he became angry, insisting that I take the money at that time.

I told him that I had another appointment in Falmouth, and I did make a phone call about five minutes of ten to another establishment in Falmouth telling them that I would be a little bit late.

He grew angry again and insisted that I take this money, that he didn't want to be bothered with an examination for the past periods, and that I should take this money now and he would file a return for the current quarter when I came down Tuesday.

I told him—I asked him how much money was on the desk, and he said, "$420." About that time I picked the money up. It was about ten o'clock. I put it in my pocket and left his office. And he said, "I'll see you Tuesday, and be sure and come down before 12.30 because I'm only here until 12.30 P.M., during the day," and I nodded and I left the premises at about ten o'clock.

Q. What did you do then? A. I immediately drove to the Smith Surrey Room, Falmouth, arriving there at approximately 10.15. When I arrived I placed a collect phone call to the District Director's [17] Office in Boston, and there was no answer since there was no—apparently no answering service at night. At about 10.20 I placed another collect call to Revenue Agent Joseph Boise in Randolph, and I spoke with him, and I told him what had transpired; that a Mr. G. S. Lopez had attempted to bride me with the sum of $420. He told me to stay there, that he would have someone call me back, my Group Supervisor, Mr. O'Brien.

At about 10.30 I received a phone call from Mr. O'Brien, my Group Supervisor. I again told him what had transpired, that Mr. Lopez had attempted to bribe me with $420. And on his instructions I drove—I left Smith's and drove

home, leaving about 10.45, and arriving home at about quarter of one in the morning.

Q. Did you thereafter turn the money over to your superiors? A. I did.

Q. To whom did you turn the money over? A. I turned this money over to Mr. Schuster, Regional Inspector.

Q. Where? A. Where?

Q. Where did this take place? A. In the office of the Regional Commissioner, Mr. Bacon, 55 Tremont Street.

Q. When? A. On the morning of Monday, October 23rd. [18] Q. Were there other people present when this took place? A. Yes, there were.

Q. Who were they? A. Mr. Bacon, Regional Commissioner, Mr. Cavanaugh, District Director, Mr. Snyder, Chief of Audit, Mr. O'Brien, my Group Supervisor and Revenue Agent Boise.

Q. Did you furnish on that occasion a statement or affidavit concerning the events that took place on October 21st? A. Yes, I did.

Q. When did you furnish this statement? A. On the morning of October 23rd.

Q. To whom did you furnish this statement? A. To Mr. Schuster, Regional Inspector.

Q. Thereafter did you return to Falmouth? A. Yes, I did.

Q. When? A. On the evening of October 23rd, 1961.

Q. Were you in company with other people? A. Yes, I was.

Q. Who? A. Four Internal Revenue Inspectors, Callahan, Pelletier, Ward and Powers.

Q. Where did you go in Falmouth that evening? A. To the Mariner Motor Inn, Falmouth.

Q. What took place? [19] A. We drove to the Mariner Motor Inn in Falmouth and we spent the evening there.

Q. What took place the next morning? A. On the next morning I was instructed by Inspectors Callahan and Peltelier to return to Clauson's Inn to keep the appointment with Mr. Lopez and to pretend to play along with the scheme, to act as though I had been bribed. They further instructed me to engage him in conversation, during which I was to bring out the amount of money that was paid me on Saturday, October 21st, and the reason, or just what Mr. Lopez wanted me to do for the money.

I was searched by Inspector Callahan, and the articles which I carried on me were listed. And I was further equipped with two electronic devices on my person.

Q. Can you describe these electronic devices that were placed on your person? A. Yes. One electronic device was called a Minifon, which is a self-contained recording unit worn in a harness beneath the left arm under the shirt, to which is affixed a microphone by means of a wire. The wire travels around the back and to the front of the body where the microphone is attached to the stomach by means of a strap.

The second was a Schmidt radio transmitter, which is worn in the inside coat pocket, to which is affixed an [20] antenna wire which travels over the right shoulder and down the left sleeve.

Q. What took place then? A. About 20 minutes of 12 in the morning I left the Mariner Motor Inn and drove to Clauson's Inn, North Falmouth. When I arrived there, I asked the desk clerk if Mr. Lopez was there, and she said he was. I met him at the front desk, and he invited me to lunch. I declined saying that I had to be back in Boston, and that I wished to get this thing wrapped up. I suggested that we go into his office and talk.

We went into his office and I sat down. I removed from my brief case a pad of worksheet paper and a blank form 720 Federal Excise Tax Return. I showed the return to

Mr. Lopez, and pointed out to him the place on the return wherein the amount of cabaret tax is stated.

He stated to me that he had never filed a return, that he never thought it was necessary, and that he wished to take me into his confidence, that he wanted me to keep him advised and keep in touch with him, and that if anything came up to let him know.

I showed Mr. Lopez the work paper, and I asked him again how much his yearly business was. He said, "About $160,000." On this work paper I recorded that, and I said, I asked him further how much in that was the amount of sales in the bar and lounge. He said, "About 30 or 35 [21] percent." I put down $50,000 as sales in the bar and lounge.

I said, "About how much of that is at night?" And we did not agree to that. I put down—we didn't agree to any amount—I put down $20,000 as representing sales at night in the bar and lounge.

I asked him when he went into business, and he said 1959, in March of that year. And I said that the tax rate during that time was 20 percent, and was he aware of that. And he said, "Yes."

I further added that it dropped to ten percent in May of 1960. He said he was aware of that. "For 1959 then," I said, "taking $15,000 at 20 percent as taxable cabaret sales for that year—the tax on that would be 20 percent of $15,000, which is $3,000." I recorded that on the work-sheet.

I said, "For 1960, part of the year it was ten percent and part of the year it was twenty percent." I said, "$8,000 at 20 percent would be—" —and at this point I made an error, and instead of putting $1600 down, which would be 20 percent of $8000, I put $4000 down, having by mistake multiplied 20 percent times $20,000.

I said, "For the balance of 1960 the tax rate was ten

percent of $12,000, which would be $1200. For 1961," I said, "approximately nine months or three quarters of [22] the year, again, about $15,000 would be cabaret—taxable cabaret sales, and the tax on this"—at which point I made another error due to nervousness—"would be—should have been 10 percent of $15,000 or $1500, and instead I put down 20 percent of $15,000, or $3000.

I added that up and it came to $11,000. He said that was kind of high. I said, "Well, for the purposes of argument we will use $10,000" because I believed the tax should be somewhere in between $9,000 and $10,000. I said, "Further, since you haven't filed for any prior period the penalty would be 25 percent, which would bring the figure up to $12,500, to which interest is added at 6 percent, and so that the amount due would be over $15,000."

I said that I didn't mean to get greedy, but what would he be gaining? At this point Mr. Lopez said, "Here, I have something for you." And he reached in his outside coat pocket and pulled out four fifty dollar bills and said, "Take this—take this now. I will have some more for you next month." I said, "How much is there there?" He said, "$200."

I took the money and placed it in my pocket. He said, "Drop down next month and I'll have some more money for you," and I didn't answer.

Mr. Lopez then went into some details concerning his [23] business background in Florida, the fact that he had been in business there for some 27 years and had lost a quarter of a million dollars in a fire.

I asked him, "How much money have you given me altogether now?" He did not answer as we were interrupted when a waitress came in. I said, "How much money did you give me last Saturday night?" And he said, "$400." I answered, "Wasn't it $420?" And he said, "Yes."

I said, "How much does that make altogether? $620?"

He said, "Yes," I said, "What do you want me to do for the $620?" He said, "I want you to be confident in me. I place the same confidence in you. I will not breathe a word of this to anyone, not even my wife, and I expect you will not do the same. I want you to keep me advised, and let me know when the pressure in your office becomes to the extent—becomes so great to the extent that you deem it advisable to let me know, and I will file a return for the current quarter."

He wanted my advice on the matter, and I did not refuse to give him any advice. And there was also some further discussion about his business background in Florida.

I again said to Mr. Lopez, "Well, for the $620 you do not—as I understand, you do not want me to examine—or you don't want me to examine any past years' returns?" [24] And he said, "Yes." "And further you don't want to file a current return for the quarter?" And he wanted to know what I would advise, and I said I could not advise him. I said, "If you file a return it would mean that you will have to pay the government money." He said, "Well," he said, "there were men from the local office down here and I satisfied them and I have not filed all this time, so that I feel I can get by without filing so long as you keep me advised."

There was some discussion further on the amount of cabaret sales. I pointed out to Mr. Lopez that although he stated that there was not much entertainment, that he had a juke box there, and that if it was used during periods when the band was on a break and patrons danced to it, that that would be just as good as having a band on the premises and a cabaret tax would be due when a juke box is playing and patrons were dancing.

And he wanted to know if I would suggest that he put up a sign saying No Dancing to make it look good, and I said that I couldn't suggest anything.

I told Mr. Lopez that I might bring my wife down, and he said, "Why don't you bring her down. Be my guest. And wait until the weather is good. Let me know and I will reserve a cottage for you down here for a weekend." [25] He further said that I should drop down again, and that he would have $200 for me then—next month rather, and any other time I wished to drop down to let him know and he would have a couple of hundred dollars for me each time I dropped down. He said that anytime I should feel free to call him on the phone, that he would meet with me, and if it became necessary to protect the both of us, he would file a current return.

I asked him, "What about Christmastime? Would he have more money for me then?" And he said, "Yes."

He was interrupted twice more, once by a phone call by a person who was apparently looking for a job, and again by a waitress who was getting some stationery or checks.

At about 12.15 our conversation was ended, and I arose and left the premises.

Q. I show you an affidavit consisting of six pages, dated October 25, 1961, signed by Roger S. Davis, and subscribed and sworn to before Richard A. Callahan, Inspector, Witness: Thomas F. Howard, Inspector, and I ask you whether or not this is the affidavit that you furnished to the inspection service of the Internal Revenue Service? A. Yes, it is.

Mr. Davis: May I approach the bench, your Honor?

[26] (Conference at the bench between Court and Counsel as follows:

Mr. Davis: I object to this affidavit. This affidavit was made on the 25th day of October, 1961, supposedly on the 25th, and this affidavit has in it a relating of events of other cases unconnected with this case. This affidavit so-called is simply a document and is in the nature of a self-serving document to forward the in-

terest of this witness' testimony. As far as we are concerned at the time, it was hearsay. This instrument when examined is something that was done in collaboration with some other people in the Department to make up a statement of past events in connection with a proposed indictment and it is completely self-serving.

The Court: Objection sustained.

. . . End of conference at the bench.)

Q. I show you a Form 720 Excise Tax Return and ask you whether or not this is the form 720 that you showed to Mr. Lopez on your visit of October 24, 1961? A. Yes, it is.

The Court: Admitted. Exhibit 3.

(Form 720, Quarterly Federal Excise Tax Return, marked government's Exhibit 3.)

[27] Q. I show you a sheet of work paper having on it figures:

"Gross 160,000
40% 50,000 bar sales
20,000 taxable 1959 20%
1959 3000
20,000 1960 4000
1200
8,000 20%
1961 3000
12,000 $11,200
10,000
2,500 25%
12,500 back taxes
+ 6%"

And I ask you whether or not this was the worksheet that you had in your possession and that you had worked out in Mr. Lopez' presence and showed to him on October 24, 1961 when you discussed this matter with him at Clauson's Inn? A. Yes, it is.

Mr. Madden: I offer this, your Honor, and ask that it be marked.

The Court: Received as Exhibit 4.

(Worksheet of Agent Davis marked government's Exhibit 4.)

Q. When you left Mr. Lopez at about 12.15 on October 24, 1961, what did you do? A. I immediately drove to the Mariner Inn in Falmouth, and awaited the return of four Inspectors. After a short [28]time they arrived. We went inside one of the rooms. They removed the electronic devices from my person. They searched my person, and I turned over the $200, the four fifty dollar bills, to Inspector Callahan. I also made a written statement following the search of what had transpired that morning.

Q. Can you identify the Inspectors who were present on this occasion? A. Inspectors Callahan, Pelletier, Ward and Powers.

Q. Can you identify the Inspector to whom you turned over the money? A. Inspector Callahan.

Q. Can you identify the Inspector who removed—were electronic devices removed from your person? A. Yes.

Q. Can you identify the Inspector who did this? A. Inspector Callahan.

Q. Were you requested to make out an affidavit concerning your conversation with Mr. Lopez? A. Yes, I was.

Q. By whom? A. Inspectors Callahan and Pelletier.

Q. Did you make out such an affidavit? A. I did.

Q. When? [29] A. Right after being searched by Inspector Callahan.

Mr. Madden: If your Honor please, I have the original of this affidavit and would offer it, but I am assuming it is subject to the same exception that was made to the earlier affidavit.

The Court: Mr. Davis nods that he would make the same objection. And I would make the same ruling, so you need not offer it.

Q. Did you then leave the Mariner Motor Inn? A. Yes, we did.

Q. What took place then? A. We drove back to the Regional Inspector's office in Boston. When we arrived, I turned over my written statement to one of the Inspectors, and following that I listened to a recording—I listened to the playing of a recording of the conversation of that morning.

Q. Was this an accurate recording of what had transpired between you and Mr. Lopez that day? A. Yes, it was an accurate recording.

Mr. Madden: You may inquire.

(The case of U.S. v. Joseph Bocchetti is taken up by the Court.)

(Recess.)

The Court: You may proceed with the cross examination, Mr. Davis.

[30] *Cross Examination by Mr. Davis*

XQ. Mr. Davis, I show you a chalk of a floor plan of Clauson's Inn, and ask you whether or not it is a fair representation of the locations of the area. A. Yes.

XQ. Now on this chalk I point down to the lower left, the extreme lower left, where it says Lopez Office. Is that a correct location, as far as you know? A. Yes.

XQ. And I point out here the lounge and bar. Is that a fair representation generally as to the arrangement of seats and chairs as you observed them there on the night

of August 31,1961? A. With the exception of a place cleared, the entrance, it is.

The Court: There being no objection, it is admitted. Exhibit A.

(Floor plan of Clauson's Inn, marked defendant's Exhibit A.)

Mr. Davis: For the purpose of clarity, I simply want to point out what the witness testified to on the Exhibit.

The Court: All right.

Mr. Davis: (To the Jury) This is Exhibit 1, what we call a chalk, as to the locations of the various rooms [31] at Clauson's Inn. I point out here the lounge and bar, as testified to, and the private office over here. And the rest speaks for itself on locations. Would you pass it among you?

XQ. Mr. Davis, on August 31, 1961, what time did you arrive at Clauson's Inn? A. I would say it was approximately Noon time, the first time.

XQ. When you arrived there did you meet and talk with the defendant? A. Yes, I did.

XQ. Where did you meet him at Clauson's Inn? A. I met him at the front desk.

XQ. For what period of time did you talk with him on that occasion? A. I would say it was about five minutes.

XQ. State to the Court and Jury what was said by you and what was said by Mr. Lopez in that conversation. A. Well, I asked him whether there was any dancing or entertainment in the bar and lounge evenings, and he replied No. I asked him, was he aware of any advertisements in which the Inn was held out to provide such dancing or entertainment, and he replied that he was not aware of such.

I showed him a copy of the Cape Cod Guide, in which [32] there was an advertisement stating there was dancing

and entertainment, and he said that he was not responsible for this.

I asked him to view the premises of the bar and lounge, and he agreed to this, and I did so.

That was substantially, as best I can recall, the conversation.

XQ. Mr. Davis, I now refer to the transcript of the evidence that was taken here on January 17, in connection with a certain motion, and I am now about to read some questions and answers as given by you.

Mr. Madden: Excuse me. The page, your Honor?

Mr. Davis: Page 12, Mr. Madden, starting at line 8.

XQ. I am questioning you and you are making the answers, and this is what took place "Q. Who is the 'he' you are referring to? A. He called the gentleman he referred to as Mr. Lopez. At that time I spoke to Mr. Lopez. I identified myself and I asked him if he had any entertainment which consisted of singing or dancing in his bar and lounge during the evening hours, and he answered No. Q. What else occurred? A. I asked him if he in any way advertised or was Clauson's Inn advertised in any way dancing or singing or other forms of entertainment, since that was the only area in Clauson's Inn where there could be any entertainment, and he said No.

[33] I then showed him a copy of the Cape Cod Guide, in which there was an advertisement which states that Clauson's Inn had dancing, I believe dancing and entertainment, or one or the other."

There was an interruption, and the Court said, "You may finish. Is there anything else you want to say." And you showed him the Cape Cod Guide.

"The Witness: I showed him the advertisement which stated there was dancing, and that was the reason for my visit, and he said he didn't know anything about it." When

that statement was made by you, was it true? A. Which statement are you referring to, sir?

XQ. "I showed him the advertisement, which stated there was dancing, and that was the reason for my visit, and he said he didn't know anything about it." When that statement was made, was it true? A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. I now ask you, Mr. Davis, as to whether or not Mr. Lopez handed you an advertisement in the New Bedford and Cape Cod Standard Times, showing an advertisement referable to his operation there? A. I cannot recall that he did show me that.

XQ. Was there any talk about an advertisement in the Cape Cod— [34] in the New Bedford and Cape Cod Standard Times referable to his operation only? A. I don't recall that there was.

XQ. This paper that I hand you purporting to be an advertisement, do you say that you never saw that before? A. I say I don't recall seeing it, sir.

XQ. When you Showed Mr. Lopez the Cape Cod Guide advertisement, whether or not he said to you, "That has nothing to do with my operation. That concerns Clauson's Golf Club, operation, as a club." Do you recall that? A. Do I recall that? No, sir. I recall he said he wasn't responsible for it.

XQ. You simply leave it that he said that he was not responsible for the Cape Cod Guide advertisement? A. Yes, sir.

XQ. Now before you talked to Mr. Lopez that morning, did you talk with someone else? A. Yes, sir, I did.

XQ. With whom did you speak on that occasion? A. Two people.

XQ. Who were they? A. The desk clerk and one Mr. Clauson.

XQ. Now during the five minutes' conversation that

ensued between you and Mr. Lopez, did he not say to you definitely that there was no dancing at night time at Clauson's Inn in the operation he was conducting? [35] A. Are you referring to Mr. Lopez?

XQ. Yes. A. He answered No to the question when I asked him.

XQ. He answered that there was no dancing there at Clauson's Inn in his operation, or words to that effect? A. I recall that he just answered No.

XQ. Well, you and I are in agreement that what was said in substance was that there was no dancing? A. Yes.

XQ. Now was there anything else that occurred during the five minutes of conversation? A. I don't recall anything else.

XQ. Do you recollect whether you talked with Mr. Clauson on August 31, 1961, before you talked with Mr. Lopez? A. Yes, sir.

XQ. Is your recollection good on that? A. I recollect speaking with him.

XQ. Did you show Mr. Clauson the advertisement in the Cape Cod Guide before you talked with Mr. Lopez? A. I don't recall that.

XQ. What did you ask of Mr. Clauson? A. I asked him whether there was any dancing on the premises evenings.

XQ. Did you ascertain at that time from Mr. Clauson that Mr. Lopez was conducting the business of food and liquor [36] at the lounge and bar and dining room at Clauson's Inn? Did you ascertain that? A. Yes, I did.

XQ. After you left Mr. Lopez, did you see Mr. Clauson again on the premises, that is, I mean, on the golf premises or at the golf club? A. Which Mr. Clauson are you referring to?

Mr. Davis: Would you please repeat the question.

(The question is read.)

A. I believe there is more than one Mr. Clauson, sir.

XQ. Did you see a Mr. Clauson on that day in the area of the Clauson's Golf Course or Club after you had talked with Mr. Lopez? A. Yes, I saw a Mr. Clauson, yes.

XQ. How long did you stay on the premises, and I mean by that in the area of the golf club, or the general area there, on the date of August 31, 1961? A. Right after that, I would say, during the day, it was only a short time, a few minutes perhaps, ten or fifteen minutes.

XQ. Isn't it a fact that you stayed in the area there, and I mean by the area the golf club, the Inn, or any place in that vicinity, for the rest of the afternoon? A. No, sir.

XQ. Well, at any rate you talked later with a Mr. Clauson, is that right? [37] A. Yes, sir.

XQ. Now you came back there that night, did you not? A. Yes, sir.

XQ. What time did you arrive there that night? A. I would say about 8.30.

XQ. Did you ever tell anyone that you arrived there about seven o'clock that night? A. No, sir. Excuse me. Arrive at the premises of the bar and lounge?

XQ. At seven o'clock. A. No, sir.

XQ. Now state to the Court what time you stayed at Clauson's Inn on August 31, 1961 in the evening. A. I would say it was between 8.30 and 9 o'clock, sir.

XQ. When you came there that night, did you inquire for Mr. Lopez? A. Yes, sir, I did.

XQ. Where did you go when you came in there that night? A. I went right into the bar and lounge.

XQ. Did you sit at the bar? A. I believe I sat at a table.

XQ. Did you remain at the bar for some two to three hours? A. No, sir.

XQ. For what period of time did you stay there that night? A. I would say it was between a half and three quarters of an hour.

[38] XQ. Well, let's see. You say you arrived there about 8 o'clock? A. 8.30, sir.

XQ. 8.30. You remained there until when? A. Between 9 and 9.15, sir.

XQ. I show you a cardboard sign. I ask you whether or not you saw that sign at the bar and lounge, or near the bar, on that night. A. No, I did not, sir.

XQ. During this period of time, did you talk with the defendant Lopez? I am referring to the time that you were there on the night of August 31, 1961. A. No, sir, I did not.

XQ. You say you asked for him? A. Yes, sir.

XQ. Did you see him on the premises? A. I did not.

XQ. From whom did you make the inquiry as to Mr. Lopez on that night. A. I believe it was the bartender, sir, although I couldn't state for sure who the gentleman was.

XQ. You were there under circumstances that night of having been told earlier in the day by Mr. Lopez that there was no dancing? A. Yes, sir.

[39] XQ. And during the period of time from 8 o'clock to 9.30 while you were there, you were not successful in seeing or talking with Mr. Lopez? A. No, sir.

XQ. Did you communicate your observations of that night to Mr. Lopez in any manner? A. No, sir.

XQ. Did you communicate your observations to anyone in authority of Clauson's Inn that night? A. No, sir.

XQ. Did you make a single statement of that to anyone, that you observed dancing? A. I did not.

XQ. Did you visit Clauson's Inn or premises between August 31, 1961 and October 21, 1961? A. No, sir.

XQ. You made a report to Mr. Carr? A. Yes, sir.

XQ. And which is in evidence here? A. Yes, sir.

XQ. Did you make or see or receive any other reports

as to the entertainment conducted at Clauson's Inn between August 31, 1961 and October 21, 1961? A. No, sir.

XQ. Did you do anything between August 31, 1961 and [40] October 21, 1961 to ascertain the type of entertainment at Clauson's Inn in relation to the manner of cabaret tax? A. Would you repeat that question?

(The question is read.)

A. No, I did not do anything.

Mr. Davis: If your Honor please, may I ask the witness to step over to the Jury box to show on the chart where something is?

The Court: You may.

Mr. Davis: If you will please, Mr. Davis?

(The witness leaves the witness stand and goes to the front of the Jury box.)

XQ. Mr. Davis, I hand you defendant's Exhibit A, and I point out on Exhibit A the area that is designated as the lounge and bar. I ask you, first, where you were sitting? Can you point that out to the Jury where you were sitting? A. Yes. Which date are you referring to?

XQ. August 31, 1961. A. I believe it was in this area here. (Indicating).

XQ. And you point not at the bar but at some table. A. Yes, sir.

XQ. Were you not sitting at the bar that night? A. No, I was not.

XQ. Would you state to the Jury, in connection with this Exhibit A, where the dancing took place? A. Yes, sir. This area, the tables which you have in the [41] diagram, was clear.

XQ. May we point that out to the Jury? A. In this area here, the tables were cleared, so there was an open space there, there weren't tables and chairs there.

XQ. Would you point that out to the members of the Jury over here please? A. In this area here (indicating),

the tables and chairs were cleared so there was an open space.

XQ. Would you resume the stand, sir?

(The witness returns to the witness stand.)

XQ. Would you please state the size of the area where the dancing took place on the night of August 31, 1961. A. In terms of feet, sir? I can't recall the size.

XQ. Have you any difficulty in measuring feet? A. No, not by estimate, no.

XQ. Would you please state it. A. Well, may I use a section of the Court to illustrate?

XQ. Definitely, sure. A. I would say the area was from approximately, well, from the edge of this stand—

XQ. Pointing to the witness stand, the side near the Judge's bench. A. —to the edge of the step there.

XQ. To the edge of the step leading up to the Judge's bench. [42] A. I don't know how many feet that is, but perhaps it is 12 or 15 feet.

XQ. And how wide? A. I would say from that wall to about this gentleman here (indicating).

XQ. Pointing from the wall in the courtroom to the stenographer. Is that what you say? A. That was about the size that night, sir.

XQ. Now later, you came to Clauson's Inn on October 21, 1961, is that correct? A. Yes, sir.

XQ. Isn't it true you came there about 8 o'clock in the evening? A. I would say it was about 8.30, sir.

XQ. When you arrived there, at that time had you ascertained any fact, occurring between August 31, 1961 and October 17, 1961, with regard to entertainment there, with respect to dancing or singing? A. No, sir.

XQ. When you came there on October 21, 1961, where did you meet Mr. Lopez? A. Right in the alcove, sir.

XQ. The alcove is located where with respect to the bar and lounge? A. It is right off the bar and lounge area.

[43] XQ. Had you come there by prearrangement to meet him on this occasion? A. No, sir, I had not.

XQ. You had no communications with him at any time between August 31, 1961, and October 21, 1961, is that correct? A. Yes, sir.

XQ. Were you alone? A. Yes, sir.

XQ. Were there any agents of the government that you knew of that were either on or near the premises on that occasion? A. No, sir.

XQ. Well, simply then the coming there by you on October 21, 1961 was a routine visit to ascertain facts pertaining to cabaret tax? A. Yes, sir.

XQ. Do you recollect that when you came there to the premises on October 21, 1961 that you asked Mr. Lopez, "What kind of business do you run here? And what contract do you have with Mr. Clauson?" A. I didn't ask him that question, not in those words, sir.

XQ. What were the words that you used? A. I just asked him what his position was, and he answered that he was manager of the bar and lounge and restaurant. And I believe I asked him what type of arrangement he had [44] with Clauson's, the management, and he answered that he paid them seven percent rental, he paid them a rental of seven percent of his receipts.

XQ. In short, he told you that he had a lease? A. Yes.

XQ. That he was in the business there of selling food and liquor? A. Yes, sir.

XQ. Is that correct? A. Yes, sir.

XQ. Where did that take place? A. In the alcove, sir.

XQ. Do you recollect that you then said, "How much business do you do here?" A. At that time? No, sir.

XQ. Well, do you recollect that in connection with that Lopez said, "On the premises here, we do approximately $160,000 in the summer months." A. He did not say "summer months," sir.

XQ. But he used the figure $160,000? A. During the evening? Yes.

XQ. Well, in the foyer, where you first met him? A. No, sir.

XQ. And in the sequence that you stated? A. No, sir.

[45] XQ. Well, do you recall that when you were in the foyer, you said, "I will have to examine your books." And you asked, "Where are they?" A. Yes.

XQ. Do you recall stating that today too? A. Yes, sir.

XQ. You recall Lopez said, "They're in my office." A. I don't believe he used the term "office."

XQ. He said, "They're on the premises"? A. At the Inn.

XQ. At any rate, you immediately asked to go to the office and sit down and discuss the books? A. No, sir.

XQ. Did you immediately go to the office, after what you have just now said as having transpired? A. No, sir.

XQ. You did go to the office with him? A. I did.

XQ. Do you recollect that when you got into the office, you said substantially, "I will have to examine the figures in the books"? A. Yes, sir.

XQ. Do you recollect that Lopez then said, "Go ahead." A. No, sir.

XQ. You do not recollect that? [46] A. No, sir.

XQ. Did you at about that time ask Lopez as to whether he would want to have the books examined at the Inn or in Boston? A. About what time, sir?

Mr. Davis: Would you read that question back?

(The question is read.)

A. No, sir.

XQ. Do you recollect that Lopez said, in connection with that, in connection with such a question, "Whatever you wish to do. It makes no difference to me. If you want to take the books to Boston, I think the bookkeeper ought to go there because I do not make the entries." A. No, sir.

XQ. Do you recollect that you replied, "I will set a date to examine the books later." A. No, sir.

XQ. Do you recollect that you made the statement, "I will set a date to examine the books later," on October 21, 1961? A. No, I do not, sir, not that statement.

XQ. I now refer to the transcript that I read from before, page 31, at the bottom of the page, the last question. "Q. Well, now, do you recollect that you went to the office, the private office at that time? A. I went there during that evening, yes. Q. Do you recollect that when [47] you got into the office you said, 'I will have to examine the books'? A. I did not say that I would have to—are you referring to that evening? Q. Sir, to make the record clear, on October 21, 1961, on Clauson's premises between 8 and 8:30? A. I stated words to the effect that I would have to examine his books and records, that I should examine his books and records, at a later date."

This last statement, I ask you whether that statement was true when you made it? A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. I again refer to the transcript, page 32, line 16. "Q. Did you question him as to whether or not he would want to have the books examined at the Inn or in Boston? A. I asked him whether it would be convenient—which place would be convienent for him." When you made that answer, was it true? A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. Referring to the transcript, page 32, line 16, the question that I have just now asked and that you have answered, I ask you whether you had discussed with [48] Mr. Lopez whether or not there were any cabaret taxes due prior to October 17, 1961. A. Excuse me, sir. You said with reference to which question?

XQ. I will say it again. I am referring to a previous question that you have just now answered, the transcript,

page 32, line 16, the question and answer, "Q. Did you question him as to whether or not he would want to have the books examined at the Inn or in Boston?" "I asked him whether it would be convenient—which place would be convenient for him." I ask you, when you made that answer to this question here, and referring to the time of the answer that you made on October 21, 1961, had you discussed with Mr. Lopez whether or not there were any cabaret taxes due prior to October 17, 1961? A. Yes, sir.

XQ. Was there any reason this morning why you did not state this to the Court and Jury, that you had discussed on the night of August 31, 1961 that there had been a discussion between you and Mr. Lopez as to whether or not there were no taxes due, cabaret taxes, prior to October 17, 1961? A. Would you please repeat that?

(The question is read.)

A. Yes, there is such a reason.

XQ. Well, there isn't any question about it, that the matter [49] of taxes, cabaret taxes, prior to October 17, 1961 had been discussed that night between you and Mr. Lopez? There is no question about that? A. May I clarify the answer, sir?

XQ. No.

Mr. Davis: I press the question.

The Court: There isn't any doubt, you discussed that topic? Yes or no?

The Witness: Yes, we discussed that topic.

(A pause.) Excuse me, your Honor.

The Court: No. Please do not add to it. You were only asked that much.

XQ. I now refer to the transcript, page 33, line 3, "Q. Well, at any rate, you said at that time, 'I will set a date later to examine the books'. A. I don't believe I said that I would set a date later, no. Q. Do you recollect what you said this morning in connection with that just now?

A. Yes, I said I would examine at a later date. But in referring to that, to explain that, the cabaret returns are filed every quarter, that is, every calendar quarter every three months. Since this was October 21, that meant that a return, if due, for the third quarter of 1961, would have to be filed by October 31 in order to incur no penalty. And this left ten days between the 21st and the 31st of October. And naturally, I felt that part of my [50] job was to expedite matters so that any returns filed by any taxpayer should be filed promptly so as to avoid a penalty, which is 5 per cent a month. Q. Aside from— A. May I finish? Q. Surely. A. Therefore, I suggested that we should—that I should look into this to see if there was a tax due, and how much, promptly, so that he could file a return, if due, before the end of October." Continuing on to page 34 of the transcript: "Q. Are you through, sir? A. Yes. Q. Now, aside from the reasoning that you have just now given, it was the fact that you said to him 'I will examine—I will set a date, a later date to examine the books?' A. I believe I said, 'I will come down next week, if that is convenient with you.'" Was that last answer true when you made it? A. Yes, sir.

XQ. Continuing on to the next question in the transcript, page 34, "Q. Does that comprise the entire conversation with respect to the books? A. With respect to the books? I believe there wasn't too much—Q. There wasn't too much said? A. —about the books. He didn't want them examined. Q. I didn't ask you that. A. Yes." Now the question in that transcript, "Q. Does that comprise the entire conversation with respect to the books? A. Yes."—Was that answer true when you made it? A. Yes, sir.

[15] XQ. Is it true now? A. Yes, sir.

XQ. That having comprised your inquiry with respect to the books, I ask you whether during all of this inquiry

at that time you stated that there were cabaret taxes due on the business for a period prior to October 17, 1961? A. No, sir.

XQ. What time elasped at the meeting on October 21, 1961 to the point where you had finished your questions with respect to the subject matter of books, as just now testified? A. I would say the lapse of time was about a half hour.

XQ. I now refer to page 43 of the transcript, line 3, "Q. Do you want to have the record stand as now on your statement that you said to him that you would come down later and examine the books? A. He suggested that I come down. Let me strike that. Mr. Lopez offered me money. Q. Wait a minute. Mr. Davis: I object to this, your Honor. I think that I am entitled to a responsive answer to the question. The Court: You are. A. I tried to stall him off. Q. Just a moment. The Court: Please read the question, and then it may be answered.

(The question is read.)

A. Yes, I stated that I would come down the following week and examine the books, if it was convenient." Was [52] that answer true when made?

A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. I now refer to the transcript, page 37, starting at the top of the page. "Q. All right. Do you recollect that at that time, in the order of events, that you said, 'If I were to examine your books, there is no doubt in my mind that I would find that you owe from $10,000 to $15,000 for cabaret tax.' A. I don't believe I said that at that time no." When that answer was made, was it true? A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. The next question, "Q. Did you substantially say that? A. $10,000 to $15,000? Q. Yes. A. On October 21?

Q. Yes. A. No, sir, I don't believe I said, 'if I examined your books I would find that,' no. Q. Did you say that the government has a claim for $10,000 to $15,000? A. The government? Q. Of cabaret taxes? A. Against him? Q. Yes. A. No, I did not. Q. You never mentioned $10,000 to $15,000 that night? A. On October 21? Q. Yes. A. No, I did not, not in the sense the government has a claim. Q. In what sense, if any, did you use it?" Page 38, "A. I don't believe I used that phrase in any sense. Q. Well, didn't you say that night that there was [53] a cabaret tax owed? A. I *said I believed* there was a cabaret tax owed. Q. In what amount? A. I attempted to come to some figure for that year. Q. What was your conclusion for the three years, as you stated? A. For the three years? Q. Yes. A. Well, I don't think he—I take that back. I didn't attempt to arrive at a figure for three years at that time. Q. Didn't you say at some time $10,000 to $15,000 is what would be owed for cabaret tax on October 21, 1961? A. I don't believe I did, no. Q. Do you recall that in connection with the statement of $10,000 to $15,000 as cabaret tax due that Mr. Lopez replied 'That is a very unfair thing to say, because there are no cabaret taxes due for the period before October 17, 1961.' Do you recollect that? A. No, I do not."

Are all those answers you made true? A. Yes, sir.

XQ. Do you recollect your testimony here this morning? A. Yes, sir.

XQ. With respect to what transpired on October 21, 1961? A. Yes.

XQ. Would you now state from your memory the testimony that you have given here this morning relative to October 21, 1961, as to your statements as to what was owed for a tax by Mr. Lopez, giving figures and dates and years, as you testified this morning. [54] A. I believe that I asked him on October 21 how much business he did a

year, and Mr. Lopez answered, "$160,000." I then asked him, "What percent of that would you say is sales in the bar and lounge?" And he answered, "Forty percent." I said, "Roughly that would be $60,000." And he answered in the affirmative. I said what percent of that would be taxable or cabaret sales at night and he said about one half and I replied, "Or $30,000." I said at the current rate of ten percent on the $30,000 that would be $3,000, and that refers to a year figure.

XQ. Do you now wish to change or modify the answers that you made?

* * *

XQ. I refer you to the answers to the questions that I put to you, reading from the transcript, on page 37 throughout the whole page, and then page 38 through line 15. In view of the answer you have just now made as to your statements as to figures on October 21, 1961, I ask you whether you want to stand on the answers that were made referable to the transcript questions and the answers, or whether you want to modify them. A. Which transcript questions?

XQ. I hand you the transcript and show you transcript page 37 [55] throughout, and page 38 through line 15. Scan it, if you will. A. (A pause.) Yes, sir.

XQ. I now ask you whether you want to stand on those answers. A. Yes, sir, I do.

XQ. In view of the answers you have just now made as to figures and statements you state you made on October 21, 1961? A. Yes, sir.

XQ. All right. Now I take it that, according to your answer on page 38 of the transcript, lines 11 and 12, "I didn't attempt to arrive at a figure for three years at that time, is that correct? A. That's correct, yes.

XQ. What was the basis of your stating to Mr. Lopez on the night of October 21, 1961 that there would be a

cabaret tax prior to October 17, 1961, in the figures that you now say that you mentioned? A. Sir, October 17th didn't enter into this.

XQ. May I substitute the date October 21, 1961 in the previous question? And would you give me an answer. A. The figures discussed on October 21st related to a year, a year's figure.

XQ. Did you understand the last question? A. Would you repeat the question, sir?

(The following question is read:

[56] "Q. What was the basis of your stating to Mr. Lopez on the night of October 21, 1961 that there would be a cabaret tax prior to October 17, 1961 in the figure that you now say you mentioned? A. Sir, October 17th didn't enter into this."

"XQ. May I substitute the date of October 21, 1961 in the previous question? And would you give me an answer. A. The figures discussed on October 21st related to a year, a year's figure.")

A. The basis of that, sir, was that I believe, the conversation that night, he stated that he had this Trio and a piano player for a period of time. Since this was October 21st, I assumed it was the period previous to October 21st. The basis of the calculation was that, the figures he gave me for $160,000 gross sales—the figure of $60,000 total sales for the bar and lounge, and his estimate of one half of that, or $30,000 sales at night, and an estimate of tax would be $3000.

XQ. And, Mr. Davis, you are an accountant? A. Yes, sir.

XQ. Did you ask Mr. Lopez whether he kept books? A. Yes, sir.

XQ. You knew the books were on the premises? A. Yes, sir.

[57] XQ. Did you ascertain that night if the books were kept in regular and proper order? A. No, sir.

XQ. Well, assuming, Mr. Davis, that they were in proper order, wasn't it your duty to examine books? A. Yes, sir.

XQ. What right did you have to tell this man that he owed money for a year without an examination of books, and without any basis in fact that there was entertainment, including dancing, for the year 1961?

Mr. Madden: Object:

The Court: I will allow the question. I don't think the jury, any more than the Judge, has forgotten what the issue in the case is. The issue is not whether the defendant would have owed taxes. The issue is whether the defendant endeavored to corrupt the witness Davis.

Mr. Davis: May I suggest, your Honor, this goes to the matter of credibility.

The Court: I realize that credibility is always available as a basis for questioning. You have been asking questions for one hour directed, as I understand it, solely to credibility and not at all as to whether or not this witness was the subject of an attempt to bribe him.

Mr. Davis: I am coming to that, your Honor. Is the [58] question allowed?

The Court: You may have the question.

XQ. Would you answer that please? A. Would you please repeat the question?

(The question is read.)

Mr. Madden: If your Honor please, my memory of what he has said here is that he did not tell him that he owed money for that year. That was the basis of my objection to the question.

The Court: I will overrule the objection. You may read the question again. I am not going to make any ruling on the tax question. It is quite enough to have to make rulings in connection with the problem of bribery.

(The question is read.)

A. I did not tell him that he owed any money.

XQ. Is that your position now, that you did not tell him that night that you were just using figures at random, without having any purpose? A. I did not tell him he owed any money to the government for the year 1961.

XQ. Did you tell him he owed any money that night for the year 1960? A. I told him—? No, sir.

XQ. Did you tell him that night that he owed any money for [59] 1959? A. No, sir.

XQ. So far as you were concerned, there was not any claim for any taxes at all? A. I didn't hear the question.

Mr. Davis: Would you read the question?

(The question is read.)

A. That is not correct, sir.

XQ. Did you have any facts, other than what you observed on August 31, 1961, and as appears in the report that is in evidence here, as to the existence of a cabaret tax relative to those premises? A. Yes, sir.

XQ. Do I understand that you neither made nor received any reports as to cabaret taxes between August 31, 1961 and October 21, 1961? A. Yes, sir.

XQ. And do I understand that you did not see any reports prior to August 31, 1961? A. Pardon me?

Mr. Davis: Would you read that question?

(The question is read.)

A. What do you mean by the word "reports?"

XQ. Memoranda, reports respecting the conduct of that business as it concerned cabaret tax. [60] A. That is correct. As I said before—well, strike that.

XQ. Did you ever hear the name Pooley? A government agent who made a report in September of 1960? A. No, sir.

XQ. It was never called to your attention? A. No, sir.

XQ. Well, coming right down to it, as far as you know, when you were there on October 21, 1961, there was not

any basis for a cabaret tax? A. That is not correct, sir.

XQ. Was there a basis there for a cabaret tax prior to August 31, 1961? A. I don't know, sir.

XQ. Was there a basis for a cabaret tax between August 31, 1961 and October 21, 1961? A. Yes, sir.

XQ. On facts known by you? A. Yes, sir.

XQ. You did not observe any facts, did you? A. Observe them when, sir?

XQ. During that period of time. A. No, sir.

XQ. I now refer to the transcript, page 39, line 15, "Q. Did you hear him say in that connection, 'So these fabulous figures you have, $10,000 to $15,000 have no [61] basis at all?' A. No. Q. Did you say in connection with that, 'may be more or less'? A. May be more or less what? Q. $10,000 or $15,000? A. No. Q. At this point in your questions of the defendant Lopez, did you shift the subject and ask the question, 'By the way, when I was here some time ago, Mr. Clauson invited me to play golf, and I did not accept the invitation. However, I would like to come down here and spend a weekend with my wife. It is a lovely place, and you have a fine golf course.' And did Mr. Lopez say in that connection, 'Please do, and come down as my guest'? And did you say 'I think I will accept that'. Did that occur or any part of it? A. I did not make that statement. Q. At all? A. That I wished to come down there? Q. On October 21, 1961. A. I did not state I wish to come down there with my wife. Q. What did you say with respect to coming down to play golf? A. During the course of the conversation, he asked me to come down with my family to stay, and I answered No, that I would not. Q. Isn't it a fact you introduced that subject? A. No, it is not." Is that answer true? A. Yes, sir.

XQ. Coming back to August 31, 1961, had you received and invitation from a Mr. Clauson to come down there and play golf? [62] A. Yes, sir.

XQ. Would you state what was said in that connection. A. I believe he asked me to play golf there.

XQ. What did you say? A. I said—I refused, I believe.

XQ. You refused? A. I refused, yes.

XQ. You recollect the topic of golf had been discussed on October 21, 1961, at the meeting there with Mr. Lopez? A. Yes, sir.

XQ. You say you did not introduce the subject? A. Yes, sir.

XQ. Prior to the discussion of that subject had you completed the questions with respect to the books? A. Yes, sir.

XQ. On your record here, the answers given here this morning, comprised everything that was said with regard to the books, that is, as I put them here to you today, right? I ask you when in sequence was this matter of golf brought up with respect to the books? A. I don't follow your question with respect to the books, sir.

XQ. All right. I will withdraw it. Now at some time there was an occurrence in which Mr. Lopez took $200 from his pocket and $100 out of the safe and said, "I am willing to [63] pay you on account of certain services." Is that correct? A. No, sir.

XQ. Well, now let's see. Isn't it true that Mr. Lopez asked you to file—to prepare and file 720 forms, which referred to cabaret tax? A. No, sir. Excuse me, sir. Prepare and file 720 forms for which period, sir?

XQ. I am asking the questions.

The Court: Well, there is an inherent ambiguity in the question as to whether the filing for him means as his counsel, or representative, or whether it means filing for him in the sense of acting as a government agent would in the ordinary course of aiding a taxpayer to a correct filling out of the form in the agency's jurisdiction.

XQ. Following his Honor's suggestion, and in the manner he stated, I am asking you to give me an answer in that respect. A. Would you please repeat it?

The Court: The question was: were you ever asked as an attorney or accountant to prepare something for this defendant?

The Witness: No, sir.

The Court: Were you ever as a representative of the Internal Revenue Service, in connection with the jurisdiction of that agency, asked to aid a taxpayer, [64] to wit, the present defendant, in connection with the filling out of the form?

The Witness: Yes, sir.

XQ. Well, now, let me go at it this way. During that meeting on October 21, 1961, you had come to a point where all that was said about books was said, as you testified here this morning, that it comprised the entire conversation with respect to books, and that you would come down there later. Do you recollect that? A. Yes, sir.

XQ. Now that subject matter having been ended, later on there was a subject of golf, is that right? A. I don't follow your question, sir. The subject of golf?

XQ. Strike it out. Later on, there came a question or a situation in which Mr. Lopez said to you something to this effect, "I don't know how to state this, but I would like for you to be a friendly agent rather than a belligerent one." Do you remember that? A. No, sir.

XQ. Do you remember he said to you, "I would like to have you prepare and do all the things that are necessary to make out the 720 forms." A. No, sir.

XQ. Do you recollect that he said to you, "I want you to make those forms out on your own time?" A. No, sir. [65] XQ. "And that I will pay you for those services"? A. No.

XQ. You don't recollect that? A. No, sir.

XQ. You don't recollect anything in that connection? A. Which connection, sir?

XQ. Of you being asked to make out 720 forms? A. Yes, sir.

XQ. What was said in that respect? A. He asked me to come down next week and help him file a return for the current quarter only.

XQ. You are sure about that? A. Yes, sir.

XQ. Coming back to the subject of money, on the night of October 21, 1961, at some point in the office on that night there was some money placed on a desk, is that right? A. Yes, sir.

XQ. Who placed it there? A. Mr. Lopez.

XQ. Wasn't it a fact that he took some money out of the safe that was in the office? A. Yes, sir.

XQ. You have testified to that this morning, do you recollect? A. Yes, sir.

XQ. And that, in addition to that, he took nioney out of his [66] pocket then and there? A. I don't know that, sir.

XQ. Well, you were watching him, were you not? A. I didn't see him take it out of his pocket, sir.

XQ. Well, at any rate, you saw him place $300 on the desk in the office, and asked you to aid and assist him to make out the 720 forms on all taxes due—

Mr. Madden: If your Honor please—

XQ. (Continuing) —for that amount of money?

Mr. Madden: If your Honor please, in the sense that $300 is a part of it, I think he might well clarify it. This question is obscure.

Mr. Davis: I think I will go along with that, your Honor. It is a fair objection.

XQ. In accordance with Mr. Madden's suggestion, I clarify the question. You say you did not see him take money out of his pocket? A. No, sir.

XQ. But you did see an amount of money placed on the desk? A. Yes, sir.

XQ. I ask you directly, was that amount $300? A. No, sir.

XQ. How much was it? A. $200.

XQ. Was there an additional amount of money placed on the desk [67] beyond the $200? A. I don't understand your question.

The Court: Well, at some time was that amount on the desk increased?

The Witness: Yes, sir.

XQ. Following his Honor's question—by how much? A. By $220.

XQ. State to the Court where that $220 came from as you observed the situation. A. I believe it came from the safe. I couldn't say for sure where it came from.

XQ. I ask you whether at that time Mr. Lopez left the private office and went to another section of the premises to get additional money. A. At which time, sir?

Mr. Davis: Would you read the question?

(The question is read.)

A. No, sir.

XQ. Do you recollect having testified here before on January 17th that Mr. Lopez left the office at some time? A. Yes, sir.

XQ. Do you recollect that your testimony was that he left the office in the first few minutes and then came back? A. Yes, sir.

XQ. Up to that time had there been any discussion as to money? [68] A. No, sir.

XQ. And you say that he did not leave the office after that? A. No, sir.

Mr. Davis: If your Honor please, I refer to the transcript, page 45, line 23.

XQ. Mr. Davis, referring to the transcript, as I have

stated, the following questions and answers were made: "Q. You say there was neither the production of money nor a statement, either by him or you, with respect to an amount before he left the office? A. He left the office before any statement—he made any statement about any payment of money to me. Q. At some point in connection with some amount, you said, 'That is not enough', is that correct? A. No. Q. At no time? A. I didn't say, 'That is not enough.' Q. At no time? A. At no time. Q. And you say there was no talk at any time with regard to $300? You understand that? A. $300, the sum of $300 as such did not enter into the talk. Q. Now, in connection with that, in connection with an amount of money mentioned, did Lopez say to you, 'That is the best I can do'? A. He said, 'That is the best I can do. When you come down—

Mr. Madden: Excuse me. I think there is another word in there, if your transcript is the same as mine, if your Honor please.

[69] The Court: Page what?

Mr. Madden: Page 46, line 17.

Mr. Davis: Line 17. "A. He said, 'That is the best I can do now.'"

Mr. Madden: The "now" is what I had in mind, your Honor.

Mr. Davis: Well, if I did not say that, I meant to.

XQ. "A. He said, 'That is the best I can do now. When you come down, I will give you more later', or words to that effect, 'I will give you more later at Christmastime.' Q. Now, at some point did you say in connection with some amount, 'That is not enough for me to waste my time with you'? A. No." Were those answers true? A. Yes, sir.

XQ. "Was there an interval at which there was a talk either of production of money or the mention of an amount of money at which Lopez left the office and went some place else on the premises? A. As I stated, he left the

office before any mention of money came up." Is that true? A. Yes, sir.

XQ. "Q. That is, when he left the office, you now want to leave it that there was no talk of money or production of money? A. He left the office a few minutes after we arrived in the office. He went outside and came back in a few minutes. Q. And at that time there had not been any talk of money or the production of [70] money? A. No money was—Three—two—no money was stated." Is that the way you want to leave it? A. Yes, sir.

XQ. Would you state the events that took place during the first few minutes after you and Mr. Lopez arrived in the office, and in the order of their occurrence before Mr. Lopez left the office.

Mr. Madden: On which occasion?

The Court: What date?

Mr. Davis: October 31, 1961.

Mr. Madden: He never testified that he was there on October 31, 1961.

Mr. Davis: October 21, I meant to say. I am sorry, Mr. Madden.

A. What was the question, sir?

The Court: Well, the question was, what happened on October 21 when you asked to see Mr. Lopez.

The Witness: In his office, the first few minutes after we arrived—?

XQ. That's right. A. The first thing he did was to ask me my full name, and I told him. He wrote that down on a slip of paper. He asked me what office I was from, and I told him, "The Boston office." I then told him that it appeared to [71] me an examination of his books and records was necessary, and he stated that he didn't wish to have any aggravation or inconvenience associated with this.

I told him that I didn't believe there would be any in-

convenience to him so long as his books were in order and they were made available to me. And I believe, he again stated that he didn't want to have any aggravation, and couldn't we make some agreement now? This time I answered No, that I had a job to do, to examine his books.

XQ. Now at that time you had never met the man before so that he knew your name, is that correct? A. Pardon?

Mr. Davis: Would you read the question?

(The question is read.)

XQ. So as to know your name? A. Yes, sir, I had.

XQ. All that transpired in the first two minutes in the office? A. Sir, he knew my name.

XQ. Did all of this statement that you have given about inconvenience of books and all of that in its context occur in the first two minutes of the conversation on the night of October 21, 1961, in the office? A. Yes, sir.

[72] XQ. I refer to the transcript, page 29, lines 21 to the end, "Q. Now, coming back to the night of October 21, 1961 when you visited the premises there, in your conversation on the occasion did you agree on some basis with Mr. Lopez to fill out Form 720, the cabaret tax, in connection with Mr. Lopez' business at Clauson's Inn in Falmouth, Massachusetts? A. I did not agree to fill out forms. The Court: The way you give the answer, it would not appear on the record, because you git it with an intonation. Will you explain what you mean? Q. Will you follow his Honor's suggestion? The Court: Read the question and the answer, please, Mr. Duffey.

(The question and answer are read.)

The Witness: Your Honor, I didn't agree to fill out the form. That is not my job. What I agreed to was to return to the premises so that he could file a return, if due." When you made that answer, was the answer true? A. Yes, sir.

XQ. Is it true now? A. Yes, sir.

XQ. And that was the main object and purpose of your return at a later date? A. Which?

XQ. Strike it out. Now with respect, Mr. Davis, to your position as a government agent, whether or not there was [73] a regulation prohibiting you from preparing cabaret taxes on your own time, on the basis of being paid for such services? Do you know of such a regulation? A. I believe there is one, sir.

XQ. Now on October 21, 1961, your testimony is that you received $420 from Mr. Lopez, is that correct? A. Yes, sir.

XQ. That you went there alone— A. Yes, sir.

XQ. —when you received it? A. Yes, sir.

XQ. That you had come there without any prearrangement? A. Yes, sir, but—excuse me.

XQ. Just a moment. You had come there without any prearrangement.

The Court: Prearrangement with whom?

Mr. Davis: With Mr. Lopez.

A. That is right.

XQ. That when you came there, there was no agent, other agent in the premises? A. Yes, sir.

XQ. And there was no other agent outside the premises. A. Yes, sir.

XQ. And there was no prearrangement with any other agent when you came there? [74] A. No, sir.

The Court: Well, weren't you instructed to go there?

The Witness: I beg your pardon, sir?

The Court: Weren't you instructed to go to Clauson's Inn on that date in October?

The Witness: No, sir.

XQ. Was the receiving of the money by you on October 21, 1961 in violation of any regulations of the Department in which you were working? A. Excuse me. May I explain that answer?

The Court: Yes, you may.

The Witness: It would be, if I accepted that money in payment for preparing the return.

The Court: I will take a recess at this time until two o'clock. I hope that after this hour and a half of cross examination, the cross examination won't be much longer, but I am not laying down a rule yet.

(Recess.)

* * *

[75] XQ. Mr. Davis, did you receive that money on October 21, 1961 under the authority of any superior? A. Superior? You mean superior officer?

XQ. Yes. A. Not a superior officer, no.

XQ. Your answer is No. A. No.

XQ. Did I understand your testimony correctly that on October 21, 1961, when you were there at Clauson's, Mr. Lopez was angry with you two or three times? A. Yes, sir.

XQ. He was angry? A. Yes, sir.

XQ. And when you left, was he angry? A. I don't believe so, sir.

XQ. Now do you know whether Agent Pelletier was assigned to receive any calls from an Agent working in the Department in the event of an offer of a bribe or if there was reason to believe there was a bribe to be offered?

Mr. Madden: When, if your Honor please?

[76] Mr. Davis: As of October 21, 1961.

A. I wouldn't know, sir.—I wouldn't know if Agent Pelletier would be the one.

XQ. Let's see. Wasn't there a routine regulation to be observed, that you were to immediately call a certain number, immediately, if there was a bribe or reason to believe there was a bribe—

Mr. Madden: Again, your Honor—

XQ. —on October 21, 1961. A. No, sir, I don't believe so, sir. Did you say—what was the date?

XQ. October 21, 1961. A. My answer is the same.

XQ. Is there some difficulty with the date? Has there been a regulation at any time to your knowledge in that respect? A. Yes, sir.

XQ. When was the regulation put into effect? A. October 23rd, 1961.

XQ. Well, at any rate you didn't call Mr. Pelletier that night? A. No, sir.

XQ. And you had no number to call? A. I did, sir.

XQ. You say you did have a number to call? A. Yes.

[77] The Court: That question really is not very clear to me.

Mr. Davis: I will follow your Honor's suggestion.

XQ. Following his Honor's suggestion, Mr. Davis, did you have a number, a telephone number to call pursuant to an understanding with the Department as of October 21, 1961? A. Yes, sir.

XQ. What was that number? A. The number of my supervisor.

XQ Who was your supervisor? A. Mr. O'Brien.

XQ. And you want to leave it that the number to be called was not Mr. Pelletier? A. Yes, sir.

XQ. Were you instructed never to receive any money having any relation to what might be considered a bribe without permission of a superior officer and without a corroborating witness? A. No, sir.

XQ. Was there any regulation in the Department to that effect as of October 21, 1961? A. A regulation pertaining to what, sir?

Mr. Davis: Would you repeat the question?

(The question is read.)

A. I don't know of any.

[78] XQ. Do you know of any regulation in effect as of now in that respect? A. Yes, sir.

XQ. There is? A. A regulation on the same subject matter?

XQ. Yes. A. I don't believe that is the way the regulation is worded to my knowledge.

XQ. How is the regulation in that respect worded to your knowledge?

The Court: May I ask how that can be relevant?

Mr. Davis: I will proceed, your Honor.

XQ. Now just two more questions with respect to October 21, 1961, and I will pass on. When you came there on October 21, 1961, did you say to Mr. Lopez that you observed singers and dancers there that night? A. Yes, sir.

XQ. What did he say when you made that observation? A. Substantially, he said that "We try to discourage it."

XQ. Isn't it a fact that he said to you that the "status has been changed since October 17, 1961 and the books so show"? A. No, sir, he did not.

XQ. On October 24, 1961, at about Noon or thereabouts, you left a certain Inn with other Agents and came to the [79] premises of Clauson's Inn, is that correct? A. Yes, sir.

XQ. You came in one automobile, the other Agents in another? A. Yes, sir.

XQ. The other Agents were Pelletier and Callahan, is that correct? A. Yes, sir.

XQ. And when you came to the premises, Pelletier entered the premises also, that is, at Clauson's Inn, on October 24, 1961? A. I don't know, sir.

XQ. You don't know that? A. I'm not sure if Pelletier did.

XQ. Were you here on January 17, 1961 when he testified in that respect? A. I was here, sir.

XQ. Does that refresh your memory? A. If he testified to that?

XQ. Yes. A. It does refresh my memory.

XQ. Was he there inside the premises? A. Yes, sir. That was his testimony.

XQ. Mr. Callahan, the Agent, was outside, is that correct? A. Yes, sir.

XQ. And you came there with two devices, and one was a Schmidt [80] device, is that correct? A. Yes, sir.

XQ. And that Schmidt is a German operation, the function of which is to transmit electronic waves, and in this case waves to transfer the sound outside of Clauson's Inn? I will rephrase it. One of the devices was a Schmidt that you had on? A. Yes, sir.

XQ. Its function was to transmit electronic waves? A. I can't verify the technical function of it.

XQ. Was that its purpose as you had it on your person? A. I believe so, sir.

XQ. Was that purpose, that the electronic waves would be picked up by another device outside? A. I believe so.

XQ. And the person who had that device to receive it was Mr. Callahan? A. Yes, sir.

XQ. Did that device work? A. I don't believe so.

XQ. On that night you had on your person another device called the Minifon, is that correct, a Minifon? A. Not that night, sir.

XQ. Excuse me. I will rephrase the question. Thank you, Mr. Davis. Referring to October 24, 1961, at or about [81] Noon time, when you came to the premises there at Clauson's Inn, whether or not you had on your person equipment called the Minifon? A. Yes, sir.

XQ. Is that the name of the make? A. Yes, sir.

XQ. That device had as its function to record the activities and statements that were made at your visit there, is that correct? A. Yes, sir.

XQ. Your object in coming there was to g ' the conversation back to the 21st, get a general discussion as to what had occurred on the 21st? A. No, sir.

XQ. That was not your purpose? A. No, it wasn't.

XQ. Were you present when Mr. Pelletier testified on January 17th? A. Yes, sir.

XQ. Is he your superior? A. Yes, sir.

XQ. Does that refresh your mind? A. Refresh my mind as to what?

XQ. As to whether that was the object and purpose? A. I don't believe that was the object and purpose. [82] XQ. You don't believe so. Well, let's see. When you arrived there on October 24, 1961, you met a girl at the desk, is that correct? A. Yes, sir.

XQ. And then you went into the cocktail lounge and met Mr. Lopez, is that right? A. No, sir.

XQ. By the way, have you heard the tape, the recording on the Minifon? A. Yes, sir.

XQ. Did you hear it prior to January 17, 1961? A. Yes, sir.

Mr. Madden: What?

The Court: 1962, I assume you mean?

Mr. Davis: 1962. I am sorry. I beg your pardon.

XQ. When you entered there did you call Mr. Lopez by name?

The Court: Entered where?

Mr. Davis: Clauson's Inn. I will put the question again.

XQ. On October 24, 1961, when you entered the premises at Clauson's Inn, did you call Mr. Lopez by name? A. Yes, sir.

XQ. Were you at that time invited to have lunch? A. Yes, sir.

XQ. Did you refuse? [83] A. Yes, sir.

XQ. Did you request to go to his private office? A. Yes, sir.

XQ. And did you go, pursuant to that, to his private office? A. Yes, sir.

XQ. When you got into the private office, did this substantially take place, that you stated that you had to get back to Boston and wanted to get a few things clear, and that you wanted to get this matter wrapped up? A. Yes, sir.

XQ. Then did you produce from your possession Form 720 and refer Mr. Lopez to the cabaret tax section of the Form? A. Yes, sir.

XQ. Did you then inquire of Mr. Lopez as to why he started his operation at Clauson's Inn and did you get a reply? A. Yes, sir.

XQ. The reply was, "Since March of 1959," is that correct? A. Yes, sir.

XQ. Coming back to the previous question that you had answered, namely, that Mr. Lopez had been doing business under a lease since March of 1959, immediately after that, I ask you whether or nor Mr. Lopez stated substantially, that he had never filed a cabaret tax return, that he never thought he needed one, and that he may have had music from time to time but that it was never steady? [84] A. Yes, sir.

XQ. Is that on the tape you have got? A. I'm not sure, sir.

XQ. It should be there, shouldn't it? A. Yes, sir.

XQ. In other words, you are there with the tape, when he again tells you that he never thought that he needed one, is that correct? A. Yes, sir.

XQ. Does that correspond with the assertions of October 21, 1961? A. Which assertions?

XQ. With respect that he did not need to file a cabaret tax because he didn't have any? A. No, sir.

XQ. With respect to the matter of music, if there was simply an orchestra there without singing or dancing,

there wouldn't be any cabaret tax, isn't that correct? A. I beg your pardon?

Mr. Davis: Would you read the question?

(The question is read.)

A. Yes, sir.

XQ. So this matter of whether he had music there that wasn't steady had no application to a cabaret tax one way or the other? [85] A. Yes, it would.

XQ. If it was without singing or dancing? A. If it was without—?

XQ. It would have no connection. A. I don't believe so.

XQ. Now when you were there on October 24, 1961, did this occur: Did you say to Mr. Lopez, "I would like to give you a few figures," or words to that effect? A. Yes, sir.

XQ. Did you then say that in view of the $160,000 gross that Lopez had admitted to receiving during the summer months, that approximately $50,000, or some forty percent, would be bar receipts? Did you say that? A. No, sir.

XQ. Did you say it here today? A. No, sir.

XQ. Is that on the tape? A. No, sir.

XQ. Did you state that half of the $50,000 would be received at night when presumably there would be entertainment? A. Words to that effect. I believe so.

XQ. That is on the tape? A. Yes, sir.

XQ. What was the basis of that statement in fact? A. The basis of that statement, sir, was that he had gross [86] sales of $160,000 per year, and if $50,000 of that was sales in the bar and lounge, and half of that, or $25,000, would be at night, or $20,000 in taxable sales, it would be less than half.

XQ. Do you want us to understand that you were telling him that the tax—there would be a tax for every day during that period? A. Would you repeat the question?

Mr. Davis: Read the question.

(The question is read.)

A. No, sir.

XQ. What do you want us to understand in that respect? A. It was merely an estimation of tax.

XQ. Without any basis or fact? A. There was basis.

XQ. What basis was there? A. Based on the $160,000 total sales, $50,000 cabaret, $20,000 taxable. That is the basis.

XQ. Now, Mr. Davis, if there were no singing or dancing in connection with the entertainment, from January 1, 1961 to October 17, 1961, there would not be any cabaret tax applicable to the operation of Clauson's Inn; isn't that correct? A. Perhaps. I can't answer that question yes or no.

XQ. Inasmuch as you have answered it "perhaps", would you give [87] us your explanation. A. If the juke box was playing without a band, and there was dancing, there would be a tax.

XQ. If there were no dancing in connection with the juke box, during all of that period of time, there would not be any cabaret tax, would there? A. As long as there was no other form of entertainment.

The Court: Mr. Davis, it is now 20 past 2. The question as to whether a tax is due is not the issue before this Court and Jury. The issues are quite different.

Mr. Davis: I will proceed, your Honor.

XQ. Now then you continued, did you not, Mr. Davis, and you said, "Some $20,000 to $25,000 a year would be taxable under the cabaret tax," and you stated further that "the band draws the people in great numbers." Did you say that on October 24, 1961? A. I don't recall that, sir.

XQ. Do you recollect that Lopez said in that connection that he would stop the people from dancing during the

week but that on Fridays and Saturdays he often neglected to do this because he was too busy and unable to control the patrons? Did he say that on October 24, 1961? A. Yes, sir.

XQ. That is on the tape? A. It may be, sir; I don't recall.

[88] XQ. You don't recall. Did you hear the tape? A. Yes.

XQ. You do not recall that? A. No, sir.

XQ. You further stated, did you not, that about $20,000 in taxable sales were made during the years Lopez had carried on the operation, is that right? A. Yes, sir. Well, will you please repeat that?

(The question and answer are read.)

Mr. Davis: I will hurry on, your Honor.

The Witness: Yes, sir.

XQ. Now for economy of time, following his Honor's suggestion, I am hurrying here, I will put the following question: then did you state that in 1959, for the nine months' operation commencing in March, there would be $15,000 in taxable receipts, at the rate of 20 percent, and the tax due of $3000. Further, that in 1960 $20,000 in taxable receipts for the year, and $8000 thereof would be taxed at 20 percent, or $4000, and $12,000 in receipts would be taxed at the reduced rate of ten percent, or $1200; that you further stated that the rate of the tax had been reduced from 20 to 10 percent during the year 1960; for the year 1961, you continued, $15,000 would be taxable receipts and at 10 percent it would be $1500 in tax. Did you further say that this amounts to [89] $11,000 in taxes? And that you then told Lopez further he would be subject to a penalty of 25 percent plus interest on the unreported tax? And that you stated the total tax and penalties due would be approximately $13,000? Now is that an approximation of what you said? A. Yes, sir.

XQ. Now did you say anything like that to him on October 21, 1961? A. No, sir.

Mr. Davis: That is all.

The Court: Is there any redirect examination?

Mr. Madden: Yes, your Honor, one question.

Redirect Examination by Mr. Madden

Q. Mr. Davis, do you recall the Court having asked you, his Honor having asked you, weren't you instructed to go to Clauson's on October 21, 1961? Do you recall that question? A. Yes, sir.

Q. Do you recall answering No? A. I do, sir.

Q. Do you have an explanation concerning your answer of No? A. Yes, sir.

Q. Will you state the explanation please. A. In the last week of August, 1961, I was assigned by my [90] group supervisor, Mr. O'Brien, to proceed to the Cape Cod area, and there I was to examine such returns as had been assigned to me for specific examination, and also to conduct a surveillance for possible non-compliance or non-filing of excise tax returns. In this connection I visited Clauson's on the 31st, for the surveillance of possible non-compliance. I made a memo of that on September 1st, stating that I would follow up my visit.

The visit to the Cape Cod area on October 21, 1961 was made again with Mr. O'Brien's instructions to proceed there for the purpose of examining, for the purpose of doing work at Smith's Surrey Room at Falmouth; also another specific examination or surveillance at one Jake's Tavern, Falmouth.

I arrived at Smith's Surrey Room about quarter of eight, or, excuse me, quarter past seven, and I ate dinner at Smith's and was informed by Mr. Smith that the entertainment there, which consisted of dancing, would not begin until 10 P.M. Therefore, when I finished dinner at

Smith's, it was 8.15. Since I had one hour and a quarter before the entertainment, and my instructions were that the general surveillance of that area was still in effect, I planned to visit both Clauson's and Jake's Tavern.

In connection with this instruction for general [91] surveillance, I did visit Clauson's Inn that night.

Mr. Madden: That is all.

Recross Examination by Mr. Davis

XQ. This last answer had reference to October 21, 1961? A. Yes, sir.

XQ. Do you recollect my question to you, that when you came there on the night of October 21, 1961, you came there for a routine purpose of ascertaining whether there was any cabaret tax due? A. I don't understand your meaning of the word "routine", sir.

XQ. What is your trouble with the word "routine"? A. In what connection do you mean "routine"?

XQ. Don't you have a job, the routine of which is to go about and examine premises, and the business of the premises, as to cabaret taxes? A. Yes, sir.

XQ. Well, isn't that the term you would use "routine? A. Yes, sir.

XQ. Isn't that the way you answered, when I asked you the question? A. Yes, sir.

Mr. Davis: That is all.

Mr. Madden: No further questions, your Honor.

[92] The Court: You are excused, Mr. Davis. The government's next witness.

Mr. Madden: Agent Joseph Boise, please.

JOSEPH BOISE, Sworn

Direct Examination by Mr. Madden

Q. Will you state your full name and address please. A. Joseph Boise, 1 Isabella Circle, Randolph, Massachusetts.

Q. What is your occupation? A. Internal Revenue Agent.

XQ. Did you receive a telephone call on the evening of October 21, 1961, from Agent Roger Davis? A. I did.

Q. Can you tell us the time that you received this telephone call? A. I received it at approximately 10.20 P.M.

Q. Can you tell where the call came from? A. The call came from Falmouth, Massachusetts.

Q. What conversation took place on this telephone call?

Mr. Davis: Just a moment. May I approach the bench?

The Court: Objection sustained.

Q. Did you have a conversation with Agent Davis on this occasion? A. I did.

[93] Q. Will you state the conversation?

Mr. Davis: Object.

The Court: Sustained.

Mr. Madden: That is all.

Mr. Davis: No questions.

The Court: Next witness.

Mr. Madden: Agent or Group Supervisor William F. O'Brien, please.

WILLIAM F. O'BRIEN, Sworn

Direct Examination by Mr. Madden

Q. Will you state your name and address. A. William F. O'Brien.

Q. What is your occupation? A. Well, my address is 295 Bellevue Street, West Roxbury 32, Massachusetts.

Q. What is your occupation? A. I am supervising Internal Revenue Agent in charge of the Excise Tax Group in the Boston District.

Q. Did you have a telephone conversation on the evening of October 21, 1961 with Agent Roger Davis? A. I did.

Q. Did you place the call? A. Yes, sir.

Q. What was the occasion for your placing the call?

[94] A. I had received a call from Agent Boise telling me—

The Court: No.

Q. To where did you place the call? A. I placed it to a number that Agent Boise had given me, and asked me to call and reach Roger Davis, and he told me—

The Court: Just a moment please. You are not to tell us what somebody else told you. That is hearsay, and is inadmissible. You may only answer precisely the question which I allow, and be very careful because we are close to the border of hearsay all along at this point.

Q. Is it true that you placed a call to Smith's Surrey Room in Falmouth, Massachusetts on the evening of October 21, 1961, as a result of your conversation with Agent Boise? A. I placed a—

The Court: Answer yes or no. Did you as a result of a conversation with Boise place this call?

The Witness: I placed a call to a telephone number in Falmouth, your Honor.

Q. And did you talk with Agent Roger Davis at that number? A. I did.

Mr. Madden: That is all.

The Court: Is there any cross examination?

[95] Mr. Davis: No, your Honor.

The Court: You are excused. Next witness.

Mr. Madden: Inspector Callahan, please.

RICHARD A. CALLAHAN, Sworn

Direct Examination by Mr. Madden

Q. Will you state your full name and address please. A. Richard A. Callahan, 39 Caroline Road, South Weymouth, Massachusetts.

Q. What is your occupation? A. Inspector of the Internal Revenue Inspection Service, United States Treasury Department.

Q. How long have you been an inspector of the Internal Revenue Service? A. Since May 15 of last year, 1961.

Q. Will you describe the duties of this office. A. As an inspector we are responsible for maintaing the integrity of the Internal Revenue Service, investigating allegations of misconduct on the part of employees, and investigating allegations of extortion and bribery involving employees, taxpayers or tax practitioners.

Q. On October 23, 1961, did you interview Agent Roger S. Davis? A. Yes, sir, I did.

[96] Q. Where did this interview take place? A. At the office of the Regional Inspector, 136 Federal Street, Boston, Massachusetts.

Q. Did you take an affidavit from Agent Davis on that occasion? A. Yes, sir, I did.

Q. Thereafter, did you accompany Revenue Agent Davis to the Mariner Motor Inn, in Falmouth, Massachusetts? A. Yes, sir, I did.

Q. Did you accompany him in the presence of other people? A. Yes, sir.

Q. Who were they? A. Inspector Edward C. Pelletier and Revenue Agent Davis and myself. We went in one car.

Q. Were there any other people? A. Yes. Inspector Charles Powers and Robert Ward went down in a different automobile.

Q. You went to the Mariner Motor Inn? A. Yes, sir.

Q. What took place there? A. On the evening of October 23rd, we checked in late at the Inn, and we spent the night there.

Q. What took place on the next morning? A. On Tusday, October 24, at approximately 9 A.M., I placed a Minifon recording device on the person of Revenue Agent [97] Davis, and also a Schmidt battery-operated radio

transmitter. We gave him certain instructions as to what he should do, when he went to Clauson's Inn, in Falmouth.

Q. State what those instructions were. A. I instructed Agent Davis to try to steer the conversation back to the meeting of October 21, when he allegedly received $420, and I gave him certain instructions as to how to lead into that.

I told him that he should explain, go into a mathematical explanation as to what he thought was due tax-wise, and I also gave him technical instructions in that he should try to steer Mr. Lopez to a quiet place, possibly his office, not to rustle papers, and to sit as close to Mr. Lopez as possible in the course of the conversation.

Q. Can you describe the electronic devices that you placed on the person of Agent Davis beyond naming them as you have already done. A. Well, the Minifon recording device is a battery-operated wire recorder, in which a wire spool is placed, which will record conversation from 30 minutes to four hours, depending on the length of the spool. It is placed in a sling, which goes underneath the shirt, and underneath the left arm of the individual wearing it, and a dynamic [98] microphone, which is soldered behind a tie clasp is jacked into the input side of the recorder.

The wire goes up around the shoulder, and the tie clasp with the microphone is clamped on the shirt, or on a strap underneath the shirt.

Q. Can you describe the Schmidt device? A. The Schmidt device is a battery-operated radio transmitter which—

The Court: Well, am I not right in thinking there was no recording as a result of the Schmidt device?

The Witness: That is correct, your Honor.

The Court: Let us not waste time on a description of something which produced no results on this occasion.

Q. Did you there at the Mariner Motor Inn, on the morning of October 24, 1961, make an inventory or search of the person of Agent Davis? A. Yes, sir, I did.

Q. Would you tell us the results of this search and inventory? A. I have a list in my notebook. The search was conducted by myself, and Inspector Edward Pelletier, at 9.20 A.M. that morning, and I have a list of what was on his person at that time here.

Q. Will you recite that list please. A. Two twenty dollar bills, three ten dollar bills, six one dollar bills, one quarter, one nickel and a silver dollar, a wallet with miscellaneous papers, a pen and [99] pencil, a notebook, his Internal Revenue Service pocket commission, a comb and handkerchief, three books of matches, one motel receipt, one glass case, one pair of glasses, two packs of gum and a briefcase containing miscellaneous government papers.

Q. What took place after your making the inventory and search and after your placing the electronic devices on the person of Agent Davis? A. At approximately 11.15 A.M., I activated the Minifon recording device on his person, and Revenue Agent Davis left in an automobile and proceeded to Clauson's Inn, and we followed in a different vehicle.

Q. What took place upon arrival at Clauson's Inn? A. At approximately 11.45 we arrived at Clauson's Inn, and I observed Revenue Agent Davis get out of the automobile and enter the building.

Q. What took place then? A. I remained outside, and at approximately 12.10 P.M. I observed Revenue Agent Davis exit Clauson's Inn, get back in his automobile and drive away.

Q. What occurred then? A. We followed, proceeded back to the Mariner Motor Inn, arriving at approximately 12.30, where I deactivated the Minifon, and once again searched Revenue Agent Davis' person.

[100] Q. What was the result of your search of his person? A. All of the articles that I previously read were on his person at that time plus four fifty dollar bills.

Q. Do you have those four fifty dollar bills? A. Yes, sir, I do.

The Court: They are admitted in evidence as Exhibit 5. Do you want to pass those to the Jury?

Mr. Madden: Yes, your Honor.

(Four fifty dollar bills marked government's Exhibit 5.)

Q. What next occurred? A. I had Revenue Agent Davis start to prepare an affidavit as to what had transpired inside, and I removed the wire, the Minifon wire from the machine. We then proceeded back to the office of the Regional Inspector in Boston, Massachusetts, where I made a copy of the recording, which had been on the person of Revenue Agent Davis during the conversation.

Q. Did you play this recording? A. Yes, sir, I did.

Q. Where? A. When I made the copy. You can monitor as the copy is being made.

Q. Who was present? A. Revenue Agent Davis, Inspector Pelletier, and I also believe the Regional Inspector, Mr. Schuster, was present.

[101] Q. Do you have this Minifon device in Court? A. Yes, sir, I do.

Q. Would you get it, and explain its operation to the Court and Jury please?

The Court: For present purposes, you may want a pointer. Do you?

Mr. Davis: If your Honor please, may we have a bench conference before this takes place?

The Court: Yes.

(Conference at the bench between Court and Counsel as follows:

Mr. Davis: The last time we were here there was

a statement made that I was going to get what I thought was a transcript. Evidently I wasn't going to be given a transcript of whatever is on the recording. Then I was told that I could get a tape, which would be a copy of a tape. I got that tape, which is a copy of the tape, and I went to the Minifon distributor, and from there I went to someone with a machine and played it, and the thing doesn't work. That is, after Mr. Davis comes in there on the premises, there is no voice. I have that with me.

Then I had a retaping of that tape at a different speed to see if I could get it. I was [102] unable to get it. In view of that, I think that your Honor ought to have in mind that if the tape that I had cannot be heard, and I have it here, that you ought to hear without the presence of the Jury anything on this device before there is anything played to the Jury.

The Court: I don't see any reason for that. But I will allow, if you wish, that this will be played slowly, and that we can then take a recess until tomorrow, and if you want to purchase from Mr. Duffey a transcript of what he gets as it is played, that is up to you.

Mr. Davis: May I also state my position in another connection on that? Of course, I presented evidence on the 17th, and also argument. I would like to address your Honor further in that respect as to a position that I now take with the Court. Your Honor asked me at the conclusion, I think, of the argument, as to whether or not—what was my position with regard to the tape itself as distinguished from the fact there was no recording outside. I am trying to state it as substantially as I can. And in the course of the statements back and forth between

myself and the Court, your Honor [103] said, "Well, is it your position that if he was in there, and he was in the private office, and that it was a protected area,"—I am not putting these words in your mouth —"suppose it was a piece of paper he wrote some notes on?" And at that time I made a distinction, that this was a secret device. I think I ill-advisedly stated my position to your Honor at that time.

I would like to take the position and state that I am now objecting to the recording for the reason that if there was a violation under the Fourth Amendment, if your Honor found that it was a violation, that it was his private office, and the circumstances were such that Agent Davis was in there under a misrepresentation, that the recording itself on the Miniform should go out.

And I state my position, on the same basis, as United States against Silverman. That is, I say that all conversation in there, if it is a violation of the Fourth Amendment, should go out. There is no distinction between statements there and statements that would be piped out.

There is a case that has come to my attention and that is the strongest case against [104] any of my contentions. I would like to discuss it with you. I have it in my folder and would like to hand it to your Honor.

The Court: Mr. Davis now hands me a decision, an opinion in Todisco v. United States, Court of Appeals, Ninth Circuit, and the particular volume from which he has gotten this is 612 U.S. T.C. paragraph number 9749. This is, of course, available in other forms, but this is quite satisfactory from my point of view as an opportunity to know what was decided.

All right. Now I will listen to your argument.

Mr. Davis: If your Honor please, it is my position that if the recording—if the entry into the private office was made on a misrepresentation, and it was a protected area under the Fourth Amendment, the recording on the person of Agent Davis should be excluded on the basis of a violation of the Fourth Amendment.

It is my position that the facts of the case are distinguishable, say, from the facts under the Todisco case, which would be probably the strongest case, that is the law stated there, that I would have to confront. [105] May I refer your Honor back to some cases that I know you will be acquainted with. The On Lee case and the Silverman case and I believe the Goldman case.

The Court: Go ahead.

Mr. Davis: The thrust of my proposition is that in the On Lee case, the Court was dealing with an area that was in the public. That was a case where an agent, a Chinese in the employ of the government, who was a friend of a defendant, came to the laundry shop which was open to the public, and had a device on his person, and there was a transmission of the occurrences and statements to an outside agent.

I say that that is distinguishable because it was a public place. I say that in all of these cases, the fundamental distinction first of all, is as to whether or not it was in a private office. The second proposition that I would like to face up to frankly, is this matter of whether or not a misrepresentation for gaining entrance constitutes a violation of the Fourth Amendment, if it was a private office or a home. It is my position that it would.

I can give your Honor a supplementary brief [106] on that or refer to cases on it. Now here is the

situation here that we are confronted with at this time. It so happens that some of the conclusions that your Honor would have to arrive at in order to make a determination may be co-extensive with some of the questions that the Jury would have to decide. I am referring to the testimony of Mr. Lopez.

It is my position that if your Honor will believe the testimony of Mr. Lopez, that as a matter of law, and I am referring now to the testimony you heard on January 17, 1962, that there would be a violation of the Fourth Amendment in the obtaining of such information, and that that should be excluded under my objection.

Consequently, I believe that the result should be that the recording should go out completely on the basis of a violation of the Fourth Amendment.

The Court: If I understand your position correctly, Mr. Davis, you wish me to make the ruling upon the basis of the transcript of today's proceedings as well as the transcript of the earlier proceedings on the 17th of [107] January, and you ask me to take into account the testimony given on both occasions and to make my ruling in the light of those facts. Is that correct?

Mr. Davis: Yes, that in addition to something else. I refer to my statement that I believe it should be on the basis of Mr. Lopez' testimony and inasmuch as—

The Court: On the earlier date?

Mr. Davis: And today further, if your Honor would, so allow.

The Court: I will not either direct him or not direct him to take the stand. That is entirely up to you. And it may be that at a later date you will make

a decision which will make it appropriate for you to renew the motion.

I will now consider any evidence you wish me to take at this time, bearing in mind the consequences, whatever they may be, of statements made under oath. It is entirely up to you.

Mr. Davis: Well, your Honor heard the testimony on January 17, 1962. At this time I should like to reserve—to press my objection at a later date.

The Court: All right. At the present time [108] I overrule your objection. And I authorize the introduction of the tapes.

Mr. Davis: My exceptions are noted?

The Court: Surely. I rely not only upon the decision of the Court of Appeals of the Ninth Circuit, Todisco against United States, but upon a ruling made recently by Judge Ford in a case now pending in this Court.

Now how long does it take to play those tapes?

Mr. Madden: About a half hour, your Honor.

The Court: I think the most orderly thing would be to play those right now, if you have them.

(To the witness: have you them here?

The Witness: Yes, sir. It's longer than a half hour.

The Court: How long?

The Witness: Because—

The Court: Just answer the question. How Long?

The Witness: I would say about an hour or an hour and a quarter. There is a lot of dead time, your Honor, driving to and from.)

The Court: Isn't it most convenient to [109] play them now, to have the court reporter take down the notes, and if you cannot get it satisfactorily, Mr.

Davis, for you to buy the transcript from Mr. Duffey so that you can use it for cross examination?

Mr. Davis: Yes, of course. There is only one difficulty, and that is getting it typed out by morning.

Mr. Madden: Excuse me, your Honor. Your Honor will recall that I represented to the Court at the hearing on the Motion to Suppress that I had written to Mr. Davis saying that he could have a copy of the recording.

The Court: Well, don't go into all that, please.

Mr. Madden: My point is, I think that when he was given a copy of it the other day, he only played one side of it.

The Court: I am not interested in what he did. I am now interested in trying to give to the defendant a fair opportunity to know what is said against him.

(To the witness: You may start playing the record.)

. . . End of conference at the bench.)

[110] The Court: To aid Mr. Duffey, perhaps if somebody has got a transcript of this, he can give it to Mr. Duffey.

Mr. Madden: I should like to say also, your Honor, I have a transcript of the conversation.

The Court: Give it to Mr. Duffey, please.

Mr. Madden: I should like to offer this, your Honor.

The Court: All right. That is received in evidence as Exhibit 6, over the objection obviously of the defendant.

(Transcript of Miniform Recording-Lopez and Davis, marked government's Exhibit 6.)

The Court: Now, please play it.

The Witness: Yes, sir.

The Court: Do you have another copy?

Mr. Madden: That is the only copy I have, your Honor. I can get a photostat.

The Court: Play it as loud as you can.

The Witness: Yes, sir.

Mr. Madden: Excuse me, your Honor. I have another copy.

The Court: It is more important that defendant's counsel should have it than that I should have it.

(The recording:

Voice: This recording device was placed on the person of Mr. Roger S. Davis at the Mariner Motor Inn, Falmouth, Massachusetts, at approximately 10.40 A.M. on October 24, 1961, by Inspector Richard Callahan in the [111] presence of Inspector Edward C. Pelletier to be used in a scheduled meeting between Mr. Davis and one G. S. Lopez at the Clauson's Inn, Falmouth, Mass., later this date.

Roll them.

* * *

Okay. Keep those things in mind now, Roger.

* * *

Okay. Keep those things in mind now, Roger. Shall I give you fellows any time to get set? How much time do you figure you will need?

* * *

Why don't you follow us? Eddie and Charlie will be inside. Get into the car. Drive slowly, and we will follow you right back here.

* * *

We're on the way.

Don't lose me now.

* * * *

This is a nice place.

Yes. Nice looking golf course.

[112] Mr. Madden: May that be stopped for a moment, your Honor? I will explain.

The Court: Yes.

Mr. Madden: Your Honor, this recording begins from the moment that he set it in operation on the person of Agent Davis at the Mariner Motor Inn until he got back there. There is—

The Court: Well, a large part of that is inadmissible.

Mr. Madden: That is true.

The Court: The only part that is admissible is the part that begins in the presence of the defendant.

Mr. Madden: (To the witness) Can you start it there?

The Court: Now I do not want to hear anything which is hearsay.

Can you start it at the right place?

The Witness: No, sir. I have to run it forward. It will take a half hour to run it forward.

The Court: You better do it tonight and we will start tomorrow morning at the right place.

The Witness: Yes, sir.

The Court: And I do not want any hearsay brought in here as the result of an electronic device.

Mr. Madden: Yes, your Honor.

The Court: The only admissible testimony here is [113] presumably that which relates to the conversation between Davis, the Agent, and the defendant Lopez. Is there anything else that you can imagine that would be admissible?

Mr. Madden: No, your Honor.

The Court: All right. Then let us not hear the rest of it. And I am glad that you got this copy, which I authorize the defendant's counsel, Mr. Davis, to keep over night.

Mr. Davis: Thank you very much, your Honor.

Mr. Madden: Yes, your Honor. My point with regard to those copies is that it is, I understand, quite difficult for a stenographer to get this with total accuracy, and this was my reason for giving the tape itself to Mr. Davis.

The Court: Well, he would have rather had the tape

plus the mimeograph, no doubt. He has it now. All right. It might very well be that with the consent of defendant's counsel Mr. Duffey may listen to this this afternoon so that he may more accurately get it tomorrow when it is played in Court. Are you willing?

Mr. Davis: Yes, your Honor.

The Court: All right. That may be done. Play it in Mr. Duffey's presence. He will then perhaps ask you to play back certain parts, so that when it is played [114] tomorrow he will be sure that he gets it correctly. It is entirely up to you, Mr. Duffey.

* * *

[115] The Court: I take it, you have the record in such form that it includes only conversation in the presence of the defendant, is that right?

RICHARD CALLAHAN, Resumed

Direct Examination by Mr. Madden, Continued

The Witness: Yes, your Honor.

The Court: All right. Will you close this window, Mr. Moore, so we have the best acoustics possible. I take it, so far as you know, it is going to correspond with the mimeographed sheet which you gave me.

The Witness: Yes, your Honor.

Mr. Davis: If your Honor please, may I approach the bench?

The Court: Yes.

(Conference at the bench between Court and counsel as follows:

Mr. Davis: I have in mind there was a question asked yesterday as to whether or not the recording he heard in substance was a fair [116] representation of what occurred, and I think he answered Yes. I point out to your Honor that in a sense that is a conclusion

as far as he is concerned, and that it is your Honor's judgment as to whether it is a fair representation.

What I have in mind is this. I am not trying to be technical. I do think it is my duty to qualify the tape to make sure it is complete. I feel that it is. But I know as a fact that in respect to these tapes, that an original tape can be cut and spliced and run over, and then it wouldn't appear in the second tape as to whether there was anything of that sort. I have enough confidence in the government that it wasn't done. I think it ought to be qualified properly.

. . . . End of conference at the bench.)

The Court: Mr. Callahan, you may take the stand. Mr. Davis, you may ask the kind of question you have indicated you would like to ask.

Cross Examination by Mr. Davis

XQ. Mr. Callahan, as part of your function, and under your supervision, did Exhibit 6, which is a tape recording, take place. I will put the question in another form. Was it part of your function and did you supervise the [117] preparing of Exhibit 6? A. If Exhibit 6 is the wire in the Minifon, I placed it in, I activated it and I deactivated it.

XQ. I ask you now as to Exhibit 6, which is a tape recording, was that done in your presence? A. The wire recording?

XQ. No, the tape. There is a tape here, Exhibit 6.

The Court: Excuse me. Let us not have any confusion. Will you hold up Exhibit 6, Mr. Duwan, so everybody knows what it is.

Mr. Madden: It is in the machine, your Honor.

The Clerk: It is in the machine, your Honor.

Mr. Davis: You do not have to take it out of the machine.

A. That is not a tape, Mr. Davis. It is a wire.

XQ. It is a wire. A. Yes, sir.

XQ. Well, you recollect that a tape was given to me the other day? A. Yes, sir, it was.

XQ. Was that tape taped from another tape? A. Yes, it was.

XQ. Where is the original tape? A. The original is the wire.

XQ. The orignal is the wire? [118] A. Yes, sir.

Mr. Davis: I think that satisfies me, your Honor.

The Court: All right. Now you may play the wire.

The Witness: Yes, sir.

(Exhibit 6 is played by the witness:

Davis: Hi. Will you call Mr. Lopez for me, please?

Female: I believe you'll find him in the cocktail lounge.

Davis: That's all right. I can find him. He's in the lounge?

Female: (Unintelligible)

Davis: Mr. Lopez.

Lopez: Hi, Mr. Davis.

Davis: How are you?

Lopez: Fine.

Davis: Do you have a few minutes.

Lopez: How about a lunch?

Davis: No. I want to—I don't have too long.

Lopez: Do you have time for lunch?

Davis: No, I have to get back to Boston . . . We certainly have a damp day today, huh?

Lopez: (Unintelligible)

Davis: Well, can we talk someplace? Your office?

Lopez: (Unintelligible)

Davis: Oh, that's all right. I'll tell you. I got to get this thing wrapped up and get back to Boston, and there are a few things I want to get clear. Now look, here's this 720 excise form we were talking about.

Lopez: Ya.

Davis: You see here's where the, this covers a lot of different excise taxes. Here's where the cabaret . . .

Lopez: Yah.

Davis: Roof gardens, cabaret. When did you start operating?

Lopez: I've been here about 2½ years now.

Davis: 2½ years . . . you started at the beginning of 1959?

Lopez: In about March. In March of 1959.

Davis: Ya, all right. Well, you never—

Lopez: We had music from time to time. No steady. We never had steady music over here.

Davis: Hmm.

Lopez: I have never filed for the, never did file cabaret tax. I never thought there was need of it. Let's put it this way.

Davis: You never filed one of these?

Lopez: I never thought there was need of it.

Davis: Well . . .

Lopez: (Unintelligible) . .

Davis: I had to do a little thinking about it. I want to give you a couple of figures now. I mean it took me a while.

Lopez: . . . I want you to have my confidence. And I want to have your confidence, too.

Davis: Well, what is it?

Lopez: Listen, I want you to understand . . . 100% confidential. I want you to place as much confidence in me, too.

(knock)

Lopez: Come in. Thank you.

Davis: Thank you. I can use a cup of coffee. This is the position I like to take place . . .

Lopez: . . . Whatever we decide to do from here

on I'd like you to be on my side and visit with me. Deduct anything you think you should and I'll be happy to . . . because you may prevent something coming up in the office. If you think I should be advised about it let me know. Pick up the phone. I can meet you in town or anywhere you want. For your information the other night I have to . . .

Davis: Well, you know I've got a job to do.

Lopez: Yes, and Uncle Sam is bigger than you and I are and we pay a lot of taxes, and if we can benefit something by it individually, let's keep it that way and believe me anything that transpires between you and I, not even my wife or my accountant or anybody is aware of it. So I want you to feel that way about it.

Davis: Well, of course, I have to, ya.

Lopez: I am 59 years of age and I had trouble in Florida. I had a marvelous business in Florida. About four years ago I lost a quarter of a million dollars of cash invested, in a fire. I lost everything. I worked for 20 years. I had a business on East Coast of Florida, between West Palm Beach and Lauderdale. I come up here. I had to borrow money to buy merchandise over here 21/2 years ago. I borrowed money from the North Attleboro First National Bank, five thousand dollars to buy food and supplies over here . . . and it is just now that I am beginning to emerge from this terrible disaster. A man to live comfortable all his life . . . I am originally from . . . I went to Florida for 27 years. I worked for the Hollywood Beach Hotel, until I opened my own little business down there and then I expand and expand. I had a terrible fire in Ft. Lauderdale 4 years ago that cost me everything that I ever worked for all my life, even my home. I had to sell my home at a sacrifice and

fight this . . . damn thing with insurance companies down there. I lost everything. I come up here and saw my chance to buy—31/2 years ago. I have a brother-in-law in North Attleboro in the restaurant business. He helped me out. He coached me along and helped me along while I was over here, and Now I am just beginning to get on my feet. I am an honest man and a decent man and I worked all my life . . . So I want you to know all those things about me. I am not a jerk and I am not a chisler.

Davis: Ya.

Lopez: I just had tough breaks and I'm going to try it again. I believe in live and let live.

Davis: Well, . . .

Lopez: You understand that. And if you have that much confidence in me, don't feel that you . . . and I like to place that much confidence in you, too because, as I say, we are trying to get by and I do not want any trouble and I'd like your advice. I'd like to know where I should go . . . at any time to file at a later date, I'll do it . . . I'll straighten it out with you.

Davis: O.K. . . . I am going to put down some figures here. Your gross was about, gross sales about 160,000.

Lopez: About 160,000.

Davis: Now 40% of that is—

Lopez: I should say about 30, about 35, conservatively.

Davis: Well, we'll say about $50,000 is bar sales.

Lopez: Ya.

Davis: Now . . . maybe roughly half of that is at night.

Lopez: Well, I should say about half of that should be at night. But I should say perhaps, you see, my

dining room is a big seller and the bar, and my dining room sells and the bar.

Davis: Ya, I understand that.

Lopez: This is the greatest. You see a very busy night at the bar, the bar itself may sell $150, $175, a good steady night in the lounge itself.

Davis: Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year.

Lopez: Ya.

Davis: Now I'd say $20,000, conservatively 25 would be cabaret sales because—

Lopez: No.

Davis: Well, . . . the band and everything . . .

Lopez: . . . the most of the business . . . at night when people actually get up and dance I have not been allowed to stop it. Which would be Friday and Saturday nights. The other nights we don't have anything anyway. The other nights is a minor thing that I can always control, but Friday and Saturday nights in the summer months, when I'm very very busy, I often neglect to get up there and do it.

Davis: Well, I'm not . . .

Lopez: That's right.

Davis: I'm not using this. You know just between you and I, I would say about $20,000 in taxable sales. You say your business isn't that much. Now look you went into business in 1959. In 1959 the tax was 20%.

Lopez: I only operated about six months under the 20%.

Davis: Well, that was 1959 and half of 1960.

Lopez: Ya.

Davis: Between 1959, out of the 20,000 could be maybe—

Lopez: Make it 5,000 . . .

Davis: Well, I'm trying to figure. You were open from March on. The big trade is in the summer.

Lopez: Ya.

Davis: Maybe 15,000. At 20% that would be $3,000.00 for 1959. In 1960, 5 months at 20%; the rest of this is 10%, do you remember that?

Lopez: Ya.

Davis: Well, . . . about 20. And 8 of this was under the 20%; 8,000 and 12 was under the 10%. So, $8,000.00 at 20% would be 4,000. 12,000 at 10% would be 1,200. In 1961, well for half the year . . . 16,000; cabaret $3,000.00. Now—

Lopez: You're very high. Actually, I mean, you're very high.

Davis: Let's see what we have here anyway. (Counting) 2, 2, 4, 8, $11,200. Well let's say . . . just for argument purposes—Between 9 and 10,000 dollars; that we know is—You haven't kept any records, you see. Now, I mean, I don't know what . . . exactly what your records show. How are your books? Do your books show any balance sheets?

Lopez: It shows just the . . .

Davis: Well, let's go back to the $10,000.00. The penalty for not filing any returns is 25%. $12,500 back taxes, conservatively, plus 6% interest, which will go on to here will I'd say run over $13,000.00. Now, I don't want to get greedy or anything but, well, what would you be gaining . . .

Lopez: I have got a couple of hundred odd dollars for you right now. Listen—

Davis: Ya, but I mean, well—

Lopez: I have . . . money right now.

Davis: I know, but—

Lopez: I'll tell you I'd like to pay as we go along and I'd like you to take me into your confidence. As

we go along a couple of hundred every time you drop in. I'd like to keep it that way.

Davis: Well,

Lopez: Don't drop in too often.

Davis: How much is here?

Lopez: Two hundred, keep it.

Davis: That makes a total of how much?

Lopez: That makes about six hundred.

Davis: How much did you give me the other night?

Lopez: About four hundred.

Davis: Four hundred twenty wasn't it?

Lopez: Yes, ya.

Davis: Ya, well, I mean, ah, well, I mean, ah, I'm taking a risk.

Lopez: Your's not taking a risk because I tell you between you and I not even my wife knows about this and I'll never mention it because this is something that I want to keep confidential.

Davis: Well, you know I stuck my neck out.

Lopez: Listen, you don't have to, you never stick your neck out with me . . . I can tell you something . . . I'm going through hell—Perhaps you will remember I was a chef at the old Webber Duck Inn. That's going back many years. This was one of my operations in Fort Lauderdale. It was one of my . . .

Davis: Ya, well look, I understand that . . .

Lopez: This place was burned up, the Alexander . . . Here I had a $245,000.00 cash, my life savings, 20 years in business that I was able to accumulate that kind of dough. From here I had to sell my car and get a train to Boston . . . to sell a car to buy groceries. I had a home. This is my former place in Hollywood—Lopez' Restaurant.

Davis: Uh, ha. Whereabouts in Hollywood?

Lopez: In Hollywood. Are you familiar with Hollywood?

Davis: No. I have never been there . . . movies?

Lopez: In Hollywood, Florida.

Davis: Oh? Hollywood, Florida.

Lopez: You see I lived in Florida for 27 years.

Davis: Ya.

Lopez: This is right close to Hollywood Beach Hotel.

Davis: Oh, ya.

Lopez: This was my home in Hollywood. I paid $35,000 for that home out of the business and I had to sell it at a sacrifice. All that money went in to fight this thing over here for six months and I had a lease on this building, and I had insurance . . . I am supposed to have . . . Everything that I invested down there was security for performance . . . I was supposed to conform. Part of my agreement was to keep a certain percent of insurance on the building at all times.

Davis: Ya.

Lopez: And I trusted a new bookkeeper who just took over my accounts. This was the 20th of December. Four, five years ago, and when he said, "Mr. Lopez, do you think too much of a high rate of the insurance . . .? Let me bargain for a better rate." I said, "Go ahead. I'm too busy with buying stuff for the holidays and everything else." So I says, "Go ahead and bargain." In the meantime my lease . . . They put a cancellation . . . on the damn thing . . . Two weeks later, the 23rd of January, 4 years ago, the 23rd of last January . . . I had this fire. I could extend it by about $30,000, but then the landlord . . . jumped on my neck. The man that owned the property said, "Now here, you failed to perform. You

were not covered by insurance . . ." I could replace that. I could borrow that money if . . .

He said, "No, no" and took me to court and fought me for six months, I lost. I had to sell everything to have a state's attorney working for me . . .

Davis: I understand.

Lopez: I came out of there cleaned and spent a lifetime trying to create something I worked for.

Davis: Ya, well I mean, I don't want to take up too much time but now you have given me $620.00. Just what do you want me to do, exactly?

Lopez: . . . another couple of months . . . drop in.

Davis: Ya. What about the past returns back to 1959?

Lopez: What do you suggest. I mean, can we get by without filing returns? I'll do whatever you suggest.

Davis: Well, I mean, it's not up to me. You're the . . .

Lopez: Ya. Do you suggest that I file some returns?

Davis: Well, I went down to see about this quarter.

Lopez: You did?

Davis: I don't know. The other night you said you wanted to file returns for this quarter.

Lopez: No . . . what do you suggest?

Davis: I can't suggest. I mean, I don't want to suggest anything because—

Lopez: Please do because, listen, if I can get by . . . up to this point. I had the local office ask for me a couple of times last year. They were here two or three times and they saw nothing out of the ordinary. They asked me if I had dancing. I said, "You see . . ." They said, "O.K., there is nothing to worry about." So I did nothing about it. I let it go. That's

the second time the local office approached me. So that's it. I mean, it was going like that. Now if you should suggest that I should file returns from this point on, I'll do it. If you suggest that I can get by without doing it, then just drop in every so often and I'll . . .

(Knock)

Lopez: I'm busy! Ya,!

Davis: Well, you know I hate to have this thing drag out. I want to—

Lopez: What do you think? Can we get by without filing? And then between you and I—

Davis: Well, if you file that means you have got to pay money.

Lopez: So. On the other hand I can . . . if you

Davis: Well, you know there is a lot of money involved.

Lopez: I'll give you a gratuity every so often and that will compensate for the audit. I mean, if there is something come up in the office here that you think I can perhaps . . . confidential, just talk to me and then I'll go ahead and file for the current last quarter. I mean I think that you will be pretty well aware of any pressure concerning the office that anything going on here. But they never did file.

Davis: Pardon.

Lopez: This place. They never, they never, they have never filed even before I come in here. They have never done it.

Davis: Ya, well you don't want me to do anything now about any returns? Right?

Lopez: That's right, but any time you think that the pressure is getting, down there—there is any comments which you no doubt will be aware of, then let me know and then I'd like to follow your suggestion

as long as we can get by without filing we'll do it, and I can . . . take care of you as we go along.

Davis: What do you think this whole thing is worth? I mean, I'm taking a risk. I'm not trying to be greedy but--

Lopez: Listen, just forget the past and figure every time you drop in . . . Come in every so often and I'll give you a couple of hundred dollars every time you come in. It won't hurt me badly and . . . I can afford and it will help you too.

Davis: Now you have given me $620.00, right?

Lopez: Hmm? . . .

Davis: . . .

Lopez: Every so often . . . and at any time you feel . . . I'll take care of you at a later date because . . . in any event that we do file returns, still I'll take care of you . . .

Davis: Well, do you expect me to do anything further for this $620.00?

Lopez: No. Just forget about that.

Davis: All right.

Lopez: Forget about that.

Davis: Ya.

Lopez: That's a thing of the past . . . If it did come up again in a couple of months . . . drop in I'll give you a couple of hundred dollars . . . a couple of . . . out of my pay and I'll be very happy to do it and it will go on. We'll continue to do it at whatever time you think that I should file . . . to protect you as well as to protect me. I want you to feel that I'm just as much interested to protect you as . . .

Let me know and . . .

If we do file at a later date for the current time, then I still take care of you as we go along because . . .

Davis: Well, I mean I want to make sure of all

these things now because we didn't have too much time to talk the other night.

Lopez: I want you to feel that way about it and feel confident, and don't hesitate to give me a call at any time and I'll be down to see you, that's all . . .

Calls do come in through the switchboard.

Davis: Ya.

Lopez: They listen. Any time you call me just leave your name and I'll be down to see you.

Davis: O.K. You mentioned something about Christmas time.

Lopez: All right.

Davis: Will you have more money then?

Lopez: Drop in and see me.

Davis: Ya.

Lopez: Drop in, I'm here every day until one o'clock . . . But if you just, if you're down this way, just give me a call before you come in so that I'll know you're coming in . . . Right now I have to go to Hyannis to pick up some stationery. I may not be here when you come in.

Davis: Ya. I'm thinking of bringing my wife down here. This would be fun.

Lopez: Why don't you bring your wife down for a week-end?

Wait until the weather's good. Come on and bring her down. Be my guest in a cottage . . .

Davis: Ya. It is a nice spot.

Lopez: And please feel free to give me your confidence because I have never betrayed anybody in my life . . . and I would not . . . I went out to the Hotel Statler last night with my wife. The first time I have been there. Celebrating our 28th Wedding Anniversary. We took our two daughters and my wife's twin sister. My brother-in-law owns the restaurant in North

Attleboro. This man. And we had, the first time in about a year that I have been out of here. And it is nice to get away from all this hard work. I work awful long hours here coming here at 7 o'clock in the morning until about one or two in the afternoon, and then I'm back again about 5 o'clock, 5:30, until midnight, until the place closes.

Davis: You have to be here to know what's going on. Right?

Lopez: . . .

Davis: Ya.

Lopez: When it is low you have to watch your purse now to keep it just what you need. Just come down. Let me know when you . . . so that I can reserve a cottage for you over the week-end. Come over and have a good time. And I want you always to feel that I'm your friend. I'm not just . . .

Davis: No. I mean, I don't want to—You put me on the spot the other night with the money.

Lopez: Listen, don't feel I put you on the spot. I'm on the spot.

Davis: Ya.

Lopez: I'm on the spot myself. Don't feel that . . .

Davis: I mean I took $420.00 from you.

Lopez: Well, all right you deserve it. I feel, I feel that it is worth it to me for not to worry about these things here. I worried for six months almost went crazy . . . down in Florida. Then I walked out of there and I worried again for a while until I get on my feet. I can get it straightened out. I worked. I went to work with my brother-in-law tending bar for about six months. Then I made this connection over here. And I borrowed the money. Then I came up . . .

And I'm getting along just about now emerging from the disaster they ever suffered. I have a daugh-

ter 26 years old who is a Medical Technician at the University of Florida in Gainsboro. I have another one 16 years old. She goes to high school right here in town, and my wife.

Davis: Ya, well I wanted to show this to you . . . that there is money involved.

Lopez: Well, I understand it. I know it is not anywheres near that time let's say, assume . . .

Davis: It is a substantial amount anyway.

Lopez: You should . . . perhaps should be anyway because even though it is perhaps 3 and 4 months without anything . . . entertainment of any kind. I know the technicalities of the law.

Davis: Well, you still have a juke box here. Right?

Lopez: Ya.

Davis: I mean, I saw people putting in, you know, coins, and they dance to it.

Lopez: They do that occasionally too. Do you suggest that I put a sign up?

Davis: . . .

Lopez: It looks good.

Davis: Well.

Lopez: . . .

Davis: You could. That's up to you. But you see, I mean, if you have a juke box here, like you do, and you allow people to dance, that's just as good as having a band.

Lopez: Ya, well I understand since I have . . .

(Sound of telephone)

. . . Lopez speaking. Ya. Ya. What are you doing now? Ya. Ya. Are you free days? You have the day duty or night duty? You have the day duty. I am looking for, I will be looking for someone that is free in the daytime. No, I'm looking for someone that's

free in the daytime. No, I am not . . . not now. Ya. Well drop in sometimes anyway. O.K.

(Hangs up receiver)

Davis: Well, you're the doctor. This two hundred dollars ought to hold me for a while.

Lopez: Listen, drop in. You can spend the week-end with the family and give me a call when you come in so I'll have a place reserved for you.

Davis: And the way you just want me to leave it.

Lopez: Providing that you feel that we should do something to protect both of us.

Davis: Ya.

Lopez: If you think there is comment is in the office that something should be done or if something has been overlooked, or whatever it is, give me a call and I'll work along with you. I'd like to shake hands on that.

Davis: O.K. O.K., Mr. Lopez, I guess that's about it. I have to get back to Boston.

Lopez: . . . Why don't you stay for lunch.

Davis: No, I can't. I have another appointment anyway and I have been away from home . . .

Lopez: . . .

Davis: That looks like a nice place there.

Lopez: . . .

Davis: Well, see you in a while.

Lopez: Bye, now.

Davis: Bye, now.

[146] *Cross Examination by Mr. Davis*

XQ. Mr. Callahan, you gave instructions to Mr. Davis with respect to what he was to do on November 24, 1961 when he got to the premises at Clauson's Inn? A. Yes, sir.

XQ. As part of your instructions, did you say to him, "Get the conversation back to the 21st. Get a general

discussion as to what had occurred on the 21st." A. Yes, sir, I did.

XQ. Did I understand you also to say, "Give him some figures. Tell him what you think is owed." A. Yes, sir. His opinion.

XQ. His opinion. A. Yes, sir.

XQ. Now at that time did you have any facts, as far as you were concerned, as to whether anything was owed at all, any basis in fact whatsoever? A. No, sir.

Mr. Davis: That is all.

The Court: Are there any further question of Mr. Callahan?

[147] Mr. Madden: No, your Honor.

The Court: You are excused. Any other witnesses for the government?

Mr. Madden: Mr. Schuster.

EMANUEL M. SCHUSTER, Sworn

Direct Examination by Mr. Madden

Q. Will you state your full name and address please. A. Emanuel M. Schuster, 17 Appleton Road, Natick, Massachusetts.

Q. What is your occupation? A. Regional Inspector, Internal Revenue Service, Boston Region.

Q. How long have you held this position? A. Since December 3rd, 1956.

Q. Will you describe the duties of your position. A. Well, as Regional Inspector, I am in charge of an office, which consists of two divisions. One is the Internal Security Division, which is responsible for maintaining and preserving the integrity of the Internal Revenue Service through the conduct of investigations into the character and reputation and loyalty, et cetera, of applicants for jobs with the Service, and also into allegations of miscon-

duct against employees, also investigations into attempted bribes by practitioners.

[148] The Internal Audit Division, the other division in the office, is responsible for conducting annual examinations of all operations in the Internal Revenue Service of this Region to assure that they are carried on with the utmost efficiency.

Q. Were you present on the morning of October 23rd, 1961 when a group of Internal Revenue officials met with Revenue Agent Roger Davis? A. I was called to the Regional Commissioner's office to meet with him, and in that office was Mr. Davis and several other officials of the Internal Revenue Service.

Q. Did Mr. Davis turn over to you $420 at that time? A. Yes, he did.

Q. Do you have the $420 with you? A. Yes, I do. (Handing envelope to Mr. Madden.)

The Court: Admitted as Exhibit 7.

(Envelope containing $420 marked government's Exhibit 7.)

The Court: Is there anything else?

Mr. Madden: One other question, your Honor.

Q. Did you thereafter issue directions to Inspector Callahan? A. Yes, I did, I assigned this case to Inspector Callahan.

Q. What directions did you issue to him? A. I instructed Inspector Callahan to make an investigation to determine the facts of this matter, to determine [149] whether in fact Mr. Lopez had given a bribe of $420 to Revenue Agent Davis, and to obtain evidence to that effect if that had been the case.

Q. Are you aware of the instructions that existed or the regulations that existed in the Service concerning the reporting of bribes on October 21, 1961? A. Yes, I am.

Q. Will you state what those regulations were. A. Well,

in an Information Notice signed by Internal Revenue Commissioner Mortimer Caplin, dated August 30, 1961, all employees were advised that Inspection had complete and full responsibility for investigations into attempted bribes of Internal Revenue employees. The employee was advised that if an approach was made to the employee in the way of a bribe, the employee should report that matter, give an evasive answer if possible and report that matter immediately to his superiors. His superiors in turn were directed to report it directly to the Inspection Service.

Q. Did your Inspection Service receive a report from the immediate superior of Agent Davis? A. Yes, sir, they did.

Q. And the time of that report? A. That was on the morning of October 23rd, 1961.

Mr. Davis: Your Honor—

[150] The Court: The only question is whether a report was received.

Mr. Davis: Your Honor, he is making an unresponsive answer. He answered that it was received at a particular time, and that is hearsay.

The Court: Were you there when it was received?

The Witness: I received a report from Mr. Davis and the Regional Commissioner.

The Court: You can tell us the time you received it but you cannot tell us when somebody else received it. When did you receive it?

The Witness: October the 23rd, the morning of October the 23rd.

The Court: Is there anything else?

Mr. Madden: No further questions, your Honor.

The Court: Is there any cross examination?

Cross Examination by Mr. Davis

XQ. You testified here before on January 17, 1961. Do you recall that, Mr. Schuster? A. Yes, I do.

XQ. I am referring now to the transcript, page 56, line 15, "Q. On October 21, 1961, whether or not there was a regulation in effect requiring any government agent to report immediately by telephone an offer of a bribe or [151] any facts that would recently indicate that a bribe was to be offered? A. On October 23rd I believe the requirement at that time was to report immediately—an agent should report immediately to his superiors—to his supervisor. Q. And who was the person assigned in the department to receive such a communication by telephone on October 21, 1961? A. On October 21, 1961, I do not believe there was a requirement to report by telephone." I ask you, sir, when that statement was made, was it true? A. Yes, sir.

XQ. In other words, on October 21, 1961—

Mr. Madden: Well, if your Honor please, I feel that he should complete the answer that the witness gave.

Mr. Davis: I will go along with that. I want to have everything in here, Mr. Madden.

XQ. Well, now thus far we have arrived at this, Mr. Schuster—that the statement is true, when you said, "On October 21, 1961, I do not believe there was a requirement to report by telephone." Then you further said in the answer, "If I can explain this? The procedures have changed since." Is that correct? A. That is correct.

XQ. I ask you, sir, whether there was an instruction to all agents under your supervision as of October 21, 1961 to [152] report to someone if there was an offer of a bribe or reason to think a bribe was to be offered? A. May I read from the Information Notice, sir?

XQ. No, sir.

Mr. Davis: Would you repeat the question?

A. The instructions were—

Mr. Davis: Just a moment. Would you repeat the question?

(The question is read.)

A. The instruction in effect on October 21 was for all employees of the Internal Revenue Service who had received or thought they were in the process of receiving an offer of a bribe to report the facts to his immediate supervisor, who in turn would report to Inspection, immediately contact them.

XQ. Was there a requirement of a telephonic communication in that respect applicable as of October 21, 1961? A. There was not.

XQ. Has that regulation changed since then? A. Yes, it has.

XQ. When did that change go into effect? A. The date of the change is October 23rd.

XQ. As of October 21, 1961, had there been instructions by you that in the event of a bribe offered to an investigating agent, or facts as to which he reasonably [153] supposed a bribe might be offered, to make a telephonic communication to Agent Pelletier immediately? A. No, sir.

XQ. Was there an instruction to telephone to some number immediately? A. On October 21? No.

XQ. There was not. A. There was not.

XQ. Was there on October 23rd, 1961? A. Yes, sir.

XQ. That is, there was a number given on October 23rd, 1961 to which a call should be made under such circumstances, is that it? A. No, sir. Their instructions on October 23rd were to report by telephone immediately. There was no number given. The number was given later.

XQ. There was a number given later, you say? A. At a later date we put out a notice furnishing the telephone numbers to be called.

XQ. When was that Notice put out? A. I do not have the exact date. I would say within the last month.

XQ. You say that you have been in the government service since 1956? A. I have been in this position since 1956.

[154] XQ. You are acquainted with the regulations as to the conduct of an agent investigating a taxpayer with respect to an excise tax, such as cabaret tax? A. I am.

XQ. Now is there a regulation that if an agent is conducting an investigation of such a taxpayer, that he is not to receive any money for services in connection with preparing cabaret taxes under investigation by him on his own time? A. There is such a regulation.

XQ. Was that regulation in effect on October 21, 1961? A. Yes, sir.

XQ. Had you ever talked with Roger Davis, the Agent here, before October 21, 1961, as to instructions as to how to make an investigation of a taxpayer on a prospective tax? A. I don't believe I ever met Agent Davis until the morning of October 23rd.

XQ. Was there a regulation in the Department prior to October 21, 1961, when an Agent, such as Mr. Davis, was investigating a taxpayer or a prospective tax, that in the event that a bribe would be offered, not to take such a bribe in the absence of a corroborating witness? A. I don't believe there is such a regulation, no, sir.

XQ. Was that the practice? [155] A. I don't know how to answer that question, as to whether there was a regular practice of this, in the nature of a bribe being offered and taken.

XQ. Let's see if we can't help. You have talked with Agents from time to time as to how they should do their work. A. Yes, sir.

XQ. Did you ever give them any instructions or lectures as to how they should do it? A. Yes, sir.

XQ. In such instructions did the subject come up—if someone was to offer a bribe, how they should act? A. Yes.

XQ. Yes is your answer. A. Yes.

XQ. How many times have you lectured in that respect? A. I really couldn't say.

XQ. A great many times? A. A half dozen or a dozen times.

XQ. Isn't it fair to say to this Court and Jury that the instructions always were to the effect that if an Agent in his investigation were offered a bribe he was not to take it unless there was a corroborating witness present? A. No, sir.

XQ. You never made such a statement in any of your instructions? A. The instructions were to avoid any conclusive statement one [156] way or the other, to try to make an evasive answer and then report the facts to his superior.

XQ. Isn't your conclusion from that that the Agent was not to do anything there without a corroborating witness? A. It would be better if he didn't.

XQ. I am asking you: isn't that your conclusion from your previous statement? A. I conclude that it would be better if he didn't.

XQ. Well, let's come down to it. Hasn't that been the practice? A. We haven't had that many cases in this area so that I could say it is the practice or not the practice.

XQ. I m not talking about the number of cases. I am talking about your practice. A. To give an evasive answer.

XQ. What is that? A. The practice is to give an evasive answer and then report to your superior.

XQ. Under any circumstances, to get out of there unless there is a corroborating witness; isn't that the practice? A. To try to get out, yes, sir.

Mr. Davis: That is all.

* * *

[168] GERMAN S. LOPEZ, Sworn

Direct Examination by Mr. Davis

Q. Would you state your name, sir. A. German S. Lopez.

Q. You are the defendant in this case? A. Yes, sir.

Q. Mr. Lopez, where do you reside? A. Falmouth, Massachusetts.

Q. How old are you? A. 59.

Q. Are you married? A. Yes.

Q. Is your wife living? A. Yes.

Q. Is she here today? A. Yes.

Q. Have you children? A. Yes.

Q. How old are they? A. 17 and 27.

Q. Where were you born? A. Cuba.

Q. How long have you been in this country? [169] A. Since 1923.

Q. Have you some language difficulty with English? A. To some extent I do.

Q. On October 21, 1961 what was your business? A. Operating the restaurant and lounge at Clauson's Inn.

Q. How long had you been there? A. Since March 1st, 1959.

Q. What was the business basis of the operation? A. A lease with Clauson's Inn.

Q. What did that provide with respect to rent? A. A percentage lease with a minimum rent guarantee.

Q. Do you still operate that business? A. Yes, I do.

Q. Were you operating that business on October 17, 1961? A. Yes.

Q. Whether or not there was any change in the operation on October 17, 1961? A. Yes.

Q. Will you state to the Court and Jury what the change was. A. We switched to entertainment which would include dancing and singing. from that date on.

Q. I ask you whether or not on October 18, 1961, whether that fact was recorded in the books? A. Yes.

Q. Are the books here today? [170] A. Yes.

Q. That fact will be shown in the books? A. Yes.

Q. Some time on August 30—August 31, rather, 1961, did you see and talk with Agent Roger Davis? A. Yes.

Q. What time of day was it? A. Approximately one o'clock in the afternoon.

Q. Where did that occur? A. At the lobby at Clauson's Inn.

Q. When you first met Mr. Davis on that occasion—

Mr. Madden: If your Honor please, the question was, sometime on August 30th.

Mr. Davis: August 31. I rephrased it.

The Court: He rephrased it to make it August 31, 1961, Mr. Madden.

Mr. Madden: August 31?

Mr. Davis: Yes, Mr. Madden. I rephrased the question.

Q. Now again referring to August 31, 1961, I ask you, when Mr. Davis first came there what occurred, what was said by you and what was said by him? A. Mr. Davis approached me. He said, "Mr. Lopez?" I said, "Yes." He said, "I am from the Internal Revenue." I said, "Yes." He said, "Did you file your cabaret tax?" I said, [171] "I did not. I do not need to."

He said, "Well, you have entertainment." I said, "We do not have entertainment here."

He said, "Well, you advertise dancing in this booklet." I said, "That booklet that you have shown me does not pertain to my operation." I said, "I will show you the ad that I use in my operation in the Cape Cod Standard Times", and I went in the office—

Q. I will stop you there. A. —and I showed—

The Court: Just a moment please.

A. (Continuing)—I showed him the ad.

Q. Did you show him a copy of the advertisement in the New Bedford and Cape Cod Standard Times at that time? A. Yes, I did.

Q. I show you a paper and ask you to examine it. A. That is correct, sir.

Q. I ask you whether or not you showed that to Mr. Davis at that time and under those circumstances. A. I did.

Mr. Davis: I offer it.

The Court: Exhibit B. Admitted.

(Advertisement in New Bedford and Cape Cod Standard Times marked defendant's Exhibit B.)

Q. How long did that conversation take place? [172] A. Approximately ten minutes.

Q. Do you recall anything else that was said at that time? A. No. That's final.

Q. Whether or not Mr. Davis left then. A. I didn't see him from there on, for that morning.

Q. Were you there in the afternoon? A. No.

Q. I am referring to the premises at Clauson's Inn. A. Not until six o'clock.

Q. Please raise your voice. A. I did not return until six o'clock.

Q. How long did you stay there at Clauson's Inn after you returned at six o'clock? A. Until one o'clock in the morning.

Q. What were you doing there? A. I was in the process of conducting my business between the lounge and restaurant.

Q. Whether or not about seven o'clock on August 30, 1961 you saw Roger Davis? A. Yes, I did.

Q. Where did you see him? A. In the lounge.

Q. Where was he sitting in the lounge? A. Sitting at the bar.

Q. For what period of time was he at the bar or in the [173] vicinity of the bar? A. Approximately three hours.

Q. That would be from seven o'clock until ten o'clock on

the night of August 31, 1961, is that right? A. That's right, sir.

Q. During that period of time, between seven and ten o'clock, whether or not you were in the lounge during that period of time. A. Yes, I was in the lounge at various times.

Q. At various times? A. Yes.

Q. Whether or not you were in full view of Mr. Davis as you came in those times? A. Yes.

Q. On the night of August 31, 1961, whether or not there was a sign there? A. Yes.

Q. How long had the sign been there? A. Since I took possession of the operation, for nearly three years.

Q. At some time was it taken down? A. It was taken down recently.

Q. I show you a sign and ask you, is that the sign there was reference to in the previous questions and answers? A. Yes.

[174] Q. Where was that sign that you have just now answered to on August 31, 1961? A. As you enter in the cocktail lounge, at the head level, in front of the bar, visible to all patrons.

Q. Would you step over to the jury rail, please, Mr. Lopez? I am handing you Exhibit A. I would like to have you locate with respect to Exhibit A where— A. Right at this point. (Indicating)

Q. Would you mark an X there please? A. Yes.

Q. Would you resume the stand, Mr. Lopez?

(The defendant returns to the witness stand.)

The Court: You can leave that with the Jury.

Q. Again referring to that sign, whether or not it was attached. A. Yes, it was.

Q. Would you state to the Court where it was attached. A. It was attached to a cross beam, right acros the room.

Q. Now as one entered the premises, shown in the lounge

room, would the No Dancing sign be in full view? A. Yes, it would.

The Court: That is received as Exhibit C.

(No Dancing sign marked defendant's Exhibit C.)

The Court: Now as you probably know, I have to hear at 12 o'clock a matter involving an SEC registration statement. You may continue for five minutes, if you want [175] to, or you make break at this point.

Mr. Davis: I would rather take a break at this point, your Honor.

The Court: All right. Mr. Foreman and members of the Jury what happened is that this morning I began a matter at 9.15, which seemed to me to be an urgent matter, and one of the counsel has to go to a funeral, leaving here for Philadelphia at three o'clock this afternoon. So I am going to take a recess in this case until 2.15. You will please return here at 2.15, and I will in the meantime hear the other case involving the alleged misrepresentation in the Securities & Exchange registration certificate.

The Court: We will proceed with the case on trial. Come back on the stand, Mr. Lopez.

Mr. Davis: May I have the last question and answer?

(The previous question and answer are read.)

GERMAN S. LOPEZ, Resumed

Direct Examination by Mr. Davis, Continued

Q. You say, Mr. Lopez, that you observed Mr. Davis, the Agent, on the premises between seven and ten o'clock that night, is that correct? A. That is correct, sir.

Q. Whether or not you saw him leave the premises that night? [176] A. I did not see him leave.

Q. You what? A. I did not see—yes, I saw him leaving around ten o'clock.

Q. You saw him leaving around ten o'clock. Now during that period, between seven and ten o'clock on the night of

August 31, 1961, did you talk with Mr. Davis? A. No, sir.

Q. During that period of time, seven to ten o'clock on August 31, 1961, whether or not there was any dancing at the lounge at Clauson's Inn? A. No, sir.

Q. How many times were you in and out of the lounge between seven and ten o'clock that night? A. Several times, I would say six, ten times, perhaps.

Q. All right. Now was there any attempt by any patron to dance that night in the lounge during that time? A. No, sir.

Q. Was there any episode in that connection of any character? A. No, sir.

Q. Now between August 31, 1961 and October 21, 1961 did you at any time see Agent Roger Davis? A. No, sir.

Q. During that time did you receive any communication whatsoever from him? A. No, sir.

[177] Q. Asking your attention to August 21, 1961, whether or not at some time— A. What is the date again, sir?

Q. October 21, 1961. Do you recollect Agent Davis coming there to the premises at Clauson's Inn? A. Yes.

Q. On October 21, 1961? A. On October 21, 1961.

Q. Did you see him on the premises? A. Yes.

Q. What time did he arrive? A. Eight o'clock.

Q. Where did you see him on that night? A. Coming in from the cocktail lounge, right at the foyer.

Q. How long that evening did he stay at Clauson's Inn? A. Until approximately 8.30, sir.

Q. Now when you first saw him at Clauson's Inn on that night, at eight o'clock in the foyer, what occurred, stating it as to what was said by you and what was said by him. A. You see, as I encountered him in the foyer, he said, "I am from the Internal Revenue, from the Internal Revenue Office." Then I said to him, "I think I remember you."

Then he went on to say, "Did you file your cabaret tax?" I said, "I did not. I did not need to."

[178] Then he went on to say, "What time—" No, at this point I said to him, "However, I do now come under the cabaret tax."

Q. What did you say to him in that respect? A. I said, "I do now come under the cabaret tax and, therefore, I do expect to file a cabaret tax from that point on," or something to that effect.

Q. With regard to that— A. "Since a week ago," I said, "I do now come under cabaret tax since about a week ago."

Q. What date, if any, did you mention? A. Then he says, "Do you have—"

Q. Just a moment.

Mr. Davis: Would you repeat that question, Mr. Duffey?

(The following question is read:

"Q. What date, if any, did you mention?")

A. October 17.

Q. What did you tell him about that date, October 17, 1961? A. Told him that we do have a singer and also have dancing. We have taken down the sign where it specifies No Dancing. From that point on, so long as we assume the cabaret tax, we can allow dancing.

Q. Now what next occurred after that? A. Then he said, "I have to examine your books. Where are they?" So I said, "My books are in my office."

[179] Q. Before he said that, do you recall whether there was any other conversation? Have you exhausted your memory? A. He asked me what kind of arrangement I had with Clauson's.

Q. All right. A. I told him I had a lease.

Q. Go ahead. A. A lease from February 1st, 1959.

Q. Go ahead. A. He said, "How much business do you do here?" I said, "We do—"

Q. Before you get into that, did you tell him about the lease? A. Yes I told him—

Q. State what you told him about the lease. A. That I had a percentage lease based on minimum rental, with a percentage.

Q. Yes. A. Then he asked me, "How much business do you do here?"

Q. What did you say to that? A. I said, "Approximately $160,000 during the summer months."

Q. Where was this conversation taking place? A. This was in the foyer.

Q. Did you go from the foyer to some other place then? A. Yes. We went to the office where he suggested.

Q. You went to the office, is that right? [180] A. Yes. He said—

Q. Just a moment. Before you left the foyer and went into the office was there anything said? A. He said, "I have to examine your books. Where are they?"

Q. When you got into the office tell us what first happened. A. Well, he said, at this point he said, "I have to examine your books." I said, "Go ahead." So he said, "If I were to examine your books—"

Q. He said that? A. Yes.

Q. Agent Davis said that? A. Yes.

Q. Go ahead. A. "If I were to examine your books, shall I do it here or examine them in Boston?"

Q. What did you say to that? A. I said, "Well, do whatever you want. If you examine them in Boston, you have to take my bookkeeper with you because I do not make the entries."

Q. Then what did he next say? A. He said, "Well, I will set a date to examine your books. I will set a later date to examine your books."

Q. Now I ask you, after he made that statement, "I will set a later date to examine your books," during that eve-

ning of October 21, 1961 was there again any mention of books? A. No, sir.

[181] The Court: Is this a convenient place in which to have a short break so that I may deal with this other case which is before me?

Mr. Davis: Yes, your Honor.

(The case of U. S. v. John L. Sullivan, Jr. is taken up by the Court.)

Mr. Davis: Mr. Duffey, would you be good enough to read the last question and answer?

(The previous question and answer are read.)

Q. Now, Mr. Lopez, what did he say or what did you say next? A. He said, "If I were to examine your books, no doubt I would find you owe from ten to fifteen thousand dollars in cabaret tax."

Q. Then what did you say? A. I said, "That is a very unfair thing to say because I do not owe any cabaret tax before October 17, and from that point on I have a record in my books where it shows proper entries and proper receipts—designated cabaret tax—subject to cabaret tax."

Q. What did he say? A. (Continuing) "So there is no basis at all for that $10,000 to $15,000 that you're talking about."

Q. What did he say? A. He said, "More or less."

Q. And then what occurred? A. At this point, Mr. Davis took a very relaxing pause for [182] a while. And he said, "By the way, the last time I was here Mr. Clauson invited me to play golf and I did not accept it." He said, "You have a lovely place over here, a beautiful golf course. I would like to come down with my wife and spend the weekend sometime." I said, "Please do. Be my guest." And then he said, "Well, I think I will accept."

Q. Now before that subject of golf was brought up was there anything said by you in that connection? A. Prior to that, in reference to what, Mr. Davis?

Q. Yes. A. I beg your pardon?

Mr. Davis: Strike that out.

Q. Who brought the subject of golf up? A. Mr. Davis brought the subject of golf up. Evidentily he has been there before—was offered to play golf and he refused.

Q. Now up to that time had there been any talk in any connection whatsoever about money of any kind? A. Not up to this time, sir.

Q. Now after that statement as to golf was made, what next occurred? Wht was said by you and what was said by him? A. Well, I said, to Mr. Davis, I said, "I don't know how to ask you this, but I would rather have you as a friendly Agent than a belligerent one," something to that effect. [183] I said, "Would you be willing to help me to prepare and file my cabaret tax whenever it comes due and do whatever is necessary to make it up? If you wish to do this, and on your own time, I will pay you for it."

Q. What did he say? A. He said, "Well, that all depends."

Q. Was there any further conversation about that topic? A. Then I said, "I have no cabaret tax due prior to October 17. My books are in order and my entries are proper." So then I sat back for a while, and then I took $200 out of my pocket, and I reached in the safe, which was aside me, and I got another $100 out of there and I put it in front, on top of the desk where he was sitting, and I said, "This is in payment for your work, for your services, part payment if you—" Then Mr. Davis said, "How much is there?"

Q. A little louder. A. Mr. Davis said, "How much is there?" I said, "$300." He said, "That's hardly enough." I said, "That's the best I can do right now."

"I can hardly jeopardize my position," he said, "for that amount." So I said, "I'm not asking you to jeopardize your position. I'm asking you to file my returns, help me to get these books properly in order, do whatever is neces-

sary to file the returns, which I am willing to pay [184] you for," I said, "I'm not trying to jeopardize your position." Then he said, "Well, I can't waste my time for that."

Q. During this time, state to the Court what was the situation with respect to the $300. A. Well, then I got up from the office and I went—

Q. Just a moment, sir. I ask you directly, whether or not at that time the $300 was on the desk. A. Yes, there was $300 on the desk.

Q. Then what next happened? A. The next thing is I got up from the office, and I went to the front desk, and I asked the cashier if she had any big money. So she went through the register and come out with $120. She said, "That is all I have."

Q. Who was the cashier? A. My daughter.

Q. What is her name? A. Claudine.

Q. She is a married girl? A. Yes.

Q. Did you take the $120? A. I came back to the office and put the other $120 in front of Mr. Davis, and he said, "How much is that". I said, "That makes it $420." "Mr. Lopez," he said, "that's hardly enough for my time." So I said, "Mr. Davis, that is the [185] best I can do right now. The next time you come down to prepare the books, to do the work, I will talk to you further."

So from that point on, there was no further conversation. He said, "Well, I will do that"—no, he didn't say that. He said, "I'll set a date. I will be back Monday or Tuesday of next week," something like that.

Q. What time did he leave? A. He left there at 8.30.

Q. Did you see him leave? A. Yes.

Q. Now asking your attention to October 24, 1961, I ask you, did you again see Mr. Roger Davis, the government agent? A. Yes, sir.

Q. Where did you see him? A. I saw him in the same location, the foyer.

Q. About what time of day was it? A. Approximately one o'clock.

Q. Was he there alone? A. Yes.

Q. When you first met him on that date, what did you say to him and what did he say to you? A. I asked Mr. Davis—after I greeted him and he greeted me back, I asked him if he would like to sit down and have some lunch. And he said, "No. I haven't got time for [186] luncheon. I have another appointment in Boston." We were in the dining room, so I said, "Let's sit here and talk." He said, "No. Let's go into your private office and talk there." Then he said, "I have to get back to Boston. I have another appointment in Boston. I want to have a few things clear. So let's get this matter wrapped up." So he pulled out—

Q. Just a moment. I am going to stop you there. The Court here this morning at my request read from the transcript that related to the recording that was going on in Court, and it was as follows:

"Lopez: We have music from time to time. No steady. We never had steady music over there.

Davis: Hmm.

Lopez: I have never filed for the, never did file cabaret tax. I never thought there was need of it. Let's put it this way.

Davis: You never filed one of these.

Lopez: I never thought there was need of it."

Do you recollect stating that to him on that date? A. Yes.

Q. Now I ask you to come back to October 21, 1961 at Clauson's Inn, and did you at that time say words to that effect to him? A. Yes, I did.

[187] Q. And was that the situation under which he came

back or was supposed to come back on October 24, 1961 with respect to the 720 Forms? A. Yes, sir.

Q. Now coming back again to October 21, 1961, what was the conversation with respect to 720 Forms? A. I asked Mr. Davis if he would be willing to help me and guide me to set my books with reference to cabaret tax, to file my taxes when they come due, whenever they may come due from after October 17, for which work I would be willing to pay him.

Q. Now have you got a recollection of the events that took place there on October 24 when Mr. Davis was there with all those figures? Have you got any real recollection on that? A. Yes, some.

Q. Some? A. Yes. At this point Mr. Davis opened his briefcase and took out a form, and he pointed out to me that this is the section "that you are interested in pertaining to the cabaret tax," and he pointed out to me this section on the 720 Form. Then he dropped that subject entirely with reference to this Form, and he put that Form back in his briefcase.

Q. Now do you recollect that you said to him on October 24, [188] 1961, something about you having confidence in him and he having confidence in you, something of that order? A. Yes.

Q. What did you have in mind at that time? A. I have in mind that I have spoken to my wife, or rather my wife is aware of the fact that I have paid Mr. Davis in cash, and she got belligerent, and we had a fight about it because she said she wanted to pay him by check. She was so upset that she wanted to call the office of the Internal Revenue. I said, "Don't do that."

Q. When did that occur? A. She wanted to call the office of the Internal Revenue to report this Mr. Davis.

Q. When did that occur? A. That occurred—did you say, "When did that occur?"

Q. Yes. A. That occurred the 22nd.

Q. On the 22nd? A. On the 22nd.

Q. On Sunday? A. Yes.

Q. Well, all right. Tell the Court what the situation was. A. So I told her that I was satisfied, that I have hired a man very capable to do the work, and I was pleased with the results.

[189] Q. What was her position on that? A. Her position was—she was still very unsatisfied, and she was very upset about it. She said, "Well, we will have to replace that money that you paid out with your own cash or with mine." I said, "We will do so."

Q. Do you recollect that Mr. Davis made a lot of statements about money referrable to various years? A. Yes, he did. In the office he again asked me what was my agreement or arrangement with Clauson, which was something we had talked about before. I said, "I have a lease here. It will be three years on February 1st." And then he said, "How much business do you do here?" Then I said, "About $160,000, approximately."

Q. Now, Mr. Lopez, do you recollect Mr. Davis mentioning a lot of figures? A. Yes. He went into a lot of figures on a white piece of paper.

Q. And what was the position that you took with respect to all those figures? A. I became very upset about it because he went into a lot of conversation, a lot of figures, talking about $10,000 or $15,000, and $12,000. And again I repeated, I said, "I never needed to file a tax because I don't come under the cabaret tax prior to October 17, "or something to that effect.

[190] I became very emotionally upset and very nervous at that time because I felt that after a series of questions that he put up to me, and the attitude that he was taking, then I felt that he was not there for the purpose that he came in there for on October 21st.

Q. Was that your state of mind during that period of time— A. Yes, it was.

Q. —when all these statements and figures were given? A. Yes.

Q. At some time whether or not he said to you something about, he's on the spot, and you said to him, "I'm on the spot." A. Yes, I did say so.

Q. What did you have in mind in that connection? A. Well, merely in reference to "I'm on the spot" because my wife, at this point she was entering the picture again, and she was very upset about the whole thing, about the way I paid the man in cash, and she wants to pay in check in order to keep her records proper.

Q. Sometime after Agent Davis left the Clauson's premises on October 24, 1961 did you call the police? A. Yes. As I say, I became very suspicious of his actions, the way they did not follow the procedure or arrangement we had talked about on the previous meeting. So I assumed—he had given me the impression he was an imposter. So I called the police immediately. As soon as [191] he stepped out of the office, I went up to the bar and asked the bartender to take the registration number of this gentleman that is just stepping out of the premises with the briefcase. So he went out and got his registration number.

And immediately I put in a call to the police station in Falmouth, and I told the Police to please trace a number, as to who owns the car, and I didn't receive a reply until around 5.30 in the evening.

So the following day, to the same respect, they gave me the name—I marked the name down.

Q. Have you exhausted your memory? A. Yes.

Q. Was the name Powers? A. I have it—Mr. Powers. They gave me the name Mr. Powers, an address in Reading. So I reported, so I called the Internal Revenue Agency office in Boston the following day around 9.30 in the morn-

ing, and I asked if Mr. Powers was employed here, and they said, "No, he is not one of our employees." Then I asked if Mr. Davis was employed here. They said, "Yes, Mr. Davis is one of our Agents."

Q. Did the man you were speaking to on the telephone give his name? A. I beg your pardon, sir?

Q. When you asked about Mr. Powers or about Mr. Davis on that [192] telephone conversation— A. It was a lady who answered the phone.

Q. Did you talk with a man? A. No, I talked with a lady, sir.

Q. All right. Was that the extent of the conversation? A. Yes.

Mr. Davis: I think that is all.

Cross Examination by Mr. Madden

XQ. I would like to go back, Mr. Lopez, to the beginning of your testimony prior to the recess this morning. Do you recall being questioned earlier today by Mr. Davis concerning what transpired at Clauson's Inn between you and Agent Davis on August 31st? A. Yes.

XQ. And do I state your testimony correctly when I say that you testified that Mr. Davis sat at the bar— A. Yes, sir.

XQ. —from 7 to 10 P.M. A. Yes, sir.

XQ. And that he was alone? To my knowledge, yes, sir.

XQ. If I were to call to this stand Mrs. Davis, Mr. Davis' wife, who were to testify that she was with him the evening of August 31, 1961, at Clauson's Inn, that he did [193] not sit at a stool at the bar but that he sat with her at a table, and that they were there approximately a half to three quarters of an hour, would you say, sir, if she so testified that she were lying?

Mr. Davis: Just a moment. I object.

The Court: It is not whether she would be lying. It is

whether her testimony would contradict your observation.

XQ. Would you say, sir, that if she were to so testify, that her testimony would contradict your observation? A. My observation is correct.

Mr. Madden: That is all.

Mr. Davis: That is all, Mr. Lopez.

The Court: All right.

Mr. Davis: Mr. Dion, would you step forth please?

HOMER J. DION, Sworn

Direct Examination by Mr. Davis

Q. Would you state your full name, Mr. Dion, please. A. Homer J. Dion.

Q. Where do you reside? A. Rochester, Massachusetts.

Q. How old are you? A. 54 years old.

Q. Are you married? [194] A. Yes.

Q. What is your business? A. I render bookkeeping services for small organizations that do not require full-time bookkeepers.

Q. In that capacity whether or not you have been employed by the defendant in this case, Mr. Lopez, with respect to business at Clauson's Inn? A. Yes.

Q. When did the employment commence? A. I started working for him about March 15, 1959.

Q. How often would you go to the premises since that time? A. Since that time I usually go to the premises about a day and a half, some times two days.

Q. Would you have occasion during the—

The Court: You mean a month?

The Witness: A week. Excuse me.

Mr. Davis: Thank you, your Honor.

Q. Would you have occasion during that period to go into the lounge? A. Yes.

Q. I show you a sign, that is an Exhibit here. Have you seen that sign before? A. Yes, I have seen it before.

Q. Where did you see it? A. Hung up close to the ceiling there in the lounge of Clauson's Inn.

[195] Q. Say, between the period of March, 1959 and August 31, 1961, did you have occasion from time to time to see that sign? A. Yes, I have.

Q. Where was it located? A. In that same spot above everybody where you could see it in the lounge.

Q. You have kept the books, have you not, with respect to this business that you have described between March, 1959 and up to date? A. Yes, I have.

Q. Asking your attention to October 18, 1961, I ask you whether or not in the course of your duties you made an entry on the books? A. Yes.

Q. Would you produce the book and the entries, please. A. Yes.

Q. What is this book that you have produced? A. This is part of the journal, the general journal of the books of Mr. Lopez.

Q. And identify the character of the entry that you made on that journal, please. A. On that particular date I indicated a change in the policy of the operation of the lounge at the Inn.

Q. With respect to that, did you have some conversation with Mr. Lopez in the nature of an instruction covering that matter? [196] A. I did.

Q. Would you state to the Court and Jury what your instructions were in that respect. A. I was instructed to set up some forms or something to record the cabaret tax as of October 16th or 17th, somewhere around there, where the entries should be made.

Q. Can you take from this journal that page?

The Court: It is not necessary, is it? Leave the marker there, and show the Jury that particular page, which is admitted as Exhibit D. What page is it? Does it have a number?

Mr. Davis: If your Honor please, I do not see a number.

The Court: Well, put a clip there, if you will, on that page. Show it to the Jury.

(Page from general journal marked defendant's Exhibit D.)

The Court: Is there anything else you want to ask this witness, Mr. Davis?

Mr. Davis: Yes, I do, your Honor. Could I take the book for just a moment and read him what it says?

The Court: Certainly.

Q. With respect to the journal entry, as just now testified to by Mr. Dion, it reads, "1961. October 16. Change in policy in entertainment. From this date liquor sales [197] subject to cabaret tax during entertainment hours. The tax is to be deducted from beverage sales, which are subject to—" What does this state here, sir? A. "subject to a rent charge."

Q. To a rent charge. A. Yes.

Q. Now, Mr. Dion, in the keeping of these books, whether or not the books are kept with reference to a lease with Clauson? A. Yes.

Q. Whether or not Clauson's accountant examined the books from time to time? A. Yes.

Q. I ask you with respect to the entries tax-wise, how were the books kept? A. On a cash basis.

Q. Any other basis? A. I do keep them also on an accrual basis.

Q. For the period that you began your employment there, March of 1959 to the date of the entry of October 18, 1961, were there any entries in those books covering cabaret tax for the business there at Clauson's Inn during that period? A. No.

Q. Now in the course of daily business whether or not there is [198] a work sheet? A. Yes.

Q. Who makes that work sheet out? A. Mrs. Lopez makes out the work sheet.

Q. What is the function of that work sheet? A. The function of that work sheet is to identify or distribute cash sales, charge sales, and total sales for the day.

Q. Now whether or not on October 18, 1961 your instructions concerned getting tax forms or getting in communication with the government concerning cabaret tax? A. Yes.

Q. What were your instructions in that respect, on October 18, 1961? A. To get in touch with an Agent that would explain to me or give me the information needed to be able to record the cabaret tax in the proper manner and to file it in the proper manner.

Q. Some time later, did you have another conversation relative to instructions from your employer, Mr. Lopez, in this respect? A. Yes, I did.

Q. What was the date of that? A. That was October 24th.

Q. What was said on that date with respect to instructions? [199] A. He told me that I wouldn't have to contact this Agent for that information, that he already had found somebody that was willing to take care of that for him.

Q. Now did you set up on the books ledgers for entries of the cabaret tax after October 17, 1961 applicable to this business? A. Yes, I did.

Q. Well, now will you state to the Court the method by which you set that up on the books? A. I used a special distribution column on the accrual basis of sales identified as "Memo. Sales of liquor and merchandise subject to cabaret tax." And I recorded it in red ink so it would be specifically identified as such.

Q. How do you get your original posting with respect to that cabaret tax entry? A. The amount of sales subject to the cabaret tax is usually given to me by Mrs. Lopez,

who computes it. Do you want me to explain how she does it?

Q. Yes, surely.

The Court: Do we have to go through all this? I frankly do not see its relevance.

Mr. Davis: All right. That is all.

The Court: Is there any cross examination?

Mr. Madden: Yes, one or two questions, your Honor.

[200] *Cross Examination by Mr. Madden*

XQ. This sign No Dancing, can you give us the dates between which you saw it? A. Not absolutely. I never paid too much attention to it, but I know it was there.

XQ. Was it there on October 24, 1961? A. I didn't see it.

XQ. Was it there on October 17, 1961? A. I don't remember if I was there in that particular place on October 17, 1961. I don't go there everyday, so I wouldn't know on that particular day if I was there or not, if the sign was there or not.

XQ. You were here in this courtroom this morning, when the recording was played? A. Yes, I was.

Q. Do you recall this talk between Mr. Lopez and Mr. Davis:

"Davis: Well, you still have a juke box here. Right?

Lopez: Ya.

Davis: I mean, I saw people putting in, you know, coins, and they dance to it.

Lopez: They do that occasionally too. Do you suggest that I put a sign up?" Do you recall that on the recording this morning? A. No, I don't recall that because I couldn't hear it very well.

[201] Mr. Madden: That is all.

Mr. Davis: Mrs. Lopez, please.

The Court: Will you step down please, Mr. Dion?

IRENE LOPEZ, Sworn

Direct Examination by Mr. Davis

Q. Would you state your name, Mrs. Lopez? A. Irene Lopez.

Q. And where do you live? A. Falmouth, Mass.

Q. Are you the wife of the defendant in this case? A. Yes.

Q. Are you on the payroll of the business there at Clauson's Inn conducted by your husband? A. Yes.

Q. As part of your duties whether or not you make out what is called a work sheet? A. Yes.

Q. Would you explain to the Court and Jury that work sheet. A. That is a recap of the day's business. The checks are accounted for, added, taxes are appropriated to the right columns. This is done every day. A cash deposit is made every day. Petty cash slips are accounted for every day to keep the records straight for Clauson's Inn.

Q. On the morning of October 22, 1961, did you have occasion [202] to examine the work sheet for the previous day of October 21, 1961? A. Yes.

Q. With respect to that what did you ascertain? A. A petty cash slip for $120.

Q. Would you describe what that petty cash slip said? A. Shall I?

Q. Yes. A. My daughter Claudina Lee was the cashier—

The Court: No. That is not what you were asked.

The Witness: Excuse me

The Court: What did the slip say?

Q. What did the slip say, Mrs. Lopez? A. "Mother. I gave Daddy $120. Claudina."

Q. As a part of your duties there with respect to that slip in making out your work sheet, did you do something to ascertain what that was about? A. Yes, I did.

Q. And what did you ascertain in that respect? A. In that respect, I told my husband that I wanted a receipt for the $120, or he and I would make it up. I would not have

any cash shortages. I wanted the records straight for Clauson's Inn. And out of his drawings and my salary we made the cash up.

[203] Q. Was that deposited in the bank? A. Yes.

Q. With respect to the work sheet of October 21? A. Yes.

Q. Now in that matter, did you find out that the $120 referred to something? A. Yes.

Q. What did it refer to as you ascertained it? A. He told me that an Agent had come in, that was going to file 720 Forms. I wanted to know if he was going to take care of any other taxes. In all businesses there are so many taxes. He said he didn't know. I said, "I want to know. Call the Internal Revenue and let me talk to them." He said, "I can't do that because I have the man's confidence, and he is going to do the work for me."

I said, "What work? How much work?" He said, "Well, I have his confidence, and he is going to do it."

The argument or the dispute lasted all night right up until Mass on Sunday morning when I found out about it.

Q. Now later on, as part of your functions, did you learn something with respect to cash that had been taken from the safe account? A. Yes.

Q. What is the name that you give to that account? [204] A. I call it the cash fund, the safe fund.

Q. Will you state to the Court and Jury what you found out in that respect and how. A. My husband said, "The safe fund will be $100 short." I said, "For the same reason?" He said, "Yes." I said, "We will make it up. We will not be short in any department. We have a lease here. We will do what is right."

Q. What did you do with respect to that? A. I also made that up with his drawing and my salary.

Q. With respect to that amount of $120, when was that made up? A. That was made up the same week, the same day, for Monday's deposit.

Q. When was the $100 made up? A. Within a week or ten days.

Q. Whether or not there was anything further said about a requirement for checks to pay this agent? A. The next time he came in, I asked my husband to get a receipt for what he would do for the money, what he expected from him for the money, and if he paid him again, to pay him by check as a receipt.

Q. When did this talk place as to your desire to go to the Internal Revenue? A. This happened on a Saturday night. About one o'clock in [205] the morning Claudina came home and told me the incident. When he came home, he verified it. The argument, or discussion, or whatever you wish to call it, lasted all night. In fact, it almost broke up the home.

Q. Did you continue to protest on this situation? A. Continuously.

Q. Have you gotten in touch with the Internal Revenue Department at any time with respect to this? A. No. I would not go over my husband.

Q. You what? A. I would not go over my husband.

Q. And is that the way you left the situation? A. Yes.

Mr. Davis: I think that is all.

Mr. Madden: I have no questions, your Honor.

The Court: You are excused. Is that the end of the defendant's case?

Mr. Davis: Yes, your Honor.

The Court: Is there any rebuttal?

Mr. Madden: Yes, your Honor. I should like to call one witness.

The Court: All right.

Mr. Madden: Mrs. Roger Davis, please.

[206] MARSHA DAVIS, Sworn

Direct Examination by Mr. Madden

Q. Will you state your full name and address, please. A. Marsha Davis, 8 Catherine Road, Framingham, Massachusetts.

Q. And you are the wife of the witness-Agent Roger Davis, who testified here previously today? A. I am.

Q. How old are you? A. 24.

Q. What does your family consist of? A. My husband, myself, and a nine month old child.

Q. Directing your attention to the evening of August 31, 1961, were you with your husband that evening? A. Yes.

Q. Were you with your husband at Clauson's Inn that evening? A. Yes.

Q. Were you in the lounge-bar of Clauson's Inn with your husband that evening? A. Yes.

Q. How long were you there? A. About three quarters of an hour, I think.

Q. Did your husband enter with you? A. Yes, he did.

Q. Did he leave with you? [207] A. Yes.

Q. Where did you sit? A. At a table.

Q. Did your husband at any time during this period sit at the bar? A. No, he did not.

Q. Can you tell us what your husband and you did at Clauson's Inn while you were there that evening? A. Well, we each ordered a couple of drinks, and during the course of the three quarters of an hour that we were there, Roger got up and played the juke box a few times.

* * *

[2] CHARGE TO THE JURY

Mr. Foreman and members of the Jury. This case comes before you on an Indictment in four counts returned by the Grand Jury on the 8th of November, 1961. In my Charge to you I shall begin with some general remarks. Then I shall move more specifically to the legal questions raised by

this case. Later I may make some reference to the facts. But if I do at any time refer to what I remember as the facts, you are entirely free to disregard anything that I say about the facts for you, the twelve members of the Jury, are the judges of the facts. You are the persons who are to test the credibility of the witnesses. Anything that I say by way of recollection of the facts, or by way of analysis of the facts, or by way of comment on the credibility of witnesses, you are entirely free to disregard.

Let me begin my general remarks by reminding you that in every criminal case the defendant enters the courtroom with the benefit of the presumption of innocence. The government has the burden of proving beyond a reasonable doubt that the defendant is guilty of every essential element with respect to the crime. The phrase "beyond a reasonable doubt" means that you must by persuaded to a moral certainty. You must be persuaded as you would want to be persuaded about the most important concerns of your life.

In a criminal case, ordinarily the matter is drawn [3] first to the attention of a Grand Jury, which sits in secret, at which the defendant is rarely present and his counsel never present. In this case there is no reason whatsoever to believe that the defendant ever had a chance to tell his side of the story to the Grand Jury and, therefore, you are the first Jury which has been called upon to consider whether or not this defendant is guilty as charged.

The Grand Jury has returned an Indictment in four counts. The Indictment itself is not evidence. It is merely a statement of charges, a complaint made by the Grand Jury on the basis of such evidence as it heard. Several times I have said that the Indictment is in four counts. Each of these counts you must consider separately for each count charges what the Grand Jury thought to be a separate crime. It does not mean, however, that as a matter of fact,

if you were to find the defendant guilty on all four counts, that he would be consecutively, that is to say cumulatively punished for four separate offenses. Indeed, I might tell you I am quite persuaded that that would be improper were the result to be that you found the defendant guilty on all four counts.

In connection with each of these four counts the basic statute is the same, and it is the bribery statute. I shall refer to that statute several times. But I am going to begin by reading to you so much of the text as is [4] relevant to this particular case. I am now reading from 18 United States Code, section 201: "Whoever promises, offers, or gives any money or thing of value, or makes or tenders any gratuity to any officer or employees or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency, with intent to influence his decision or action on any question, matter, cause, or proceeding, which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be" punished as provided in the statute.

You will notice, if you attended carefully, that there are five separate elements which the government must prove beyond a reasonable doubt. First, the government must prove that the defendant gave or promised something of value. Second, the government must prove beyond a reasonable doubt that the gift or promise was made to an officer or employee of the United States. Third, the government must prove beyond a reasonable doubt that the person to whom the offer or gift or promise or payment was made

was acting in an [5] official function. Fourth, the government must prove beyond a reasonable doubt that the defendant knew that the person was an officer, or agent, and was acting in his official capacity. And, fifth, the government must prove beyond a reasonable doubt that he did it with the necessary specific intent spelled out in the statute, that intent, speaking loosely, being to defraud or to induce a fraud upon the United States.

Now, although I have described the matter generally, it is important for me to call to your attention the difference between the four counts because, as I have told you, each of the counts is the charge of a separate crime. And when you get to the jury room you will have with you the Indictment, and this will refresh your recollection of what I am now going to say.

The first count refers to October 21, 1961, and each of the three following counts, two, three and four, refer to October 24, 1961.

The counts do have certain things in common. All four of them make reference to the fact that Roger S. Davis is alleged to have been an employee acting for and on behalf of the Treasury Department of the United States in his official function as Revenue Agent in the Internal Revenue Service, Department of the Treasury, under authority of such Department.

[6] All of the counts also allege that the defendant knew that Roger S. Davis was an agent and was acting in his official capacity. The counts differ with respect to what was given or offered.

The first count refers to the charge that the defendant Lopez gave $420 on October 21. The second count refers to the charge that the defendant Lopez gave $200 on October 24, 1961 to Roger S. Davis. The third count refers to a charge that Lopez did promise $200 additional, and made that promise on October 24, 1961. And the fourth count

refers to a charge that Lopez did promise a thing of value, to wit, an expense-paid weekend accommodation for Roger S. Davis, his wife and family, at the Honeymoon Cottage, Clauson's Inn, North Falmouth, Massachusetts; said promise, it being charged, was made about October 24, 1961.

There are not only the differences which I have just called to your attention with respect to the items of value alleged to have been given or promised, but there is, and I particularly call your attention to this, a difference between count one, on the one hand, and counts two, three, and four on the other hand, as to what the alleged intent of the defendant Lopez was.

According to count one, which, as you will recall, refers to October 21, 1961, the Grand Jury charged the defendant with intent to induce said Davis to omit to do an [7] act in violation of his lawful duty, to wit, to refrain from making an examination of the books and records relating to sales and receipts of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960 and the first two quarters of the year 1961, from computing a cabaret tax on said sales and receipts and from reporting the same to the Internal Revenue Service.

Now you will undoubtedly have observed that this is a charge that the intent was an intent to induce Davis not to examine books. Counts two, three and four are counts in which the Grand Jury charged the defendant Lopez with intent to influence Davis to aid in committing a fraud on the United States, to wit, to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts for the years 1959, 1960, 1961 and thereafter.

Now the language of counts two, three and four, with respect to the alleged specific intent is roughly the same,

and you will note that, unlike count one, counts two, three and four do not say that the intent was to induce Davis to refrain from examining books, but, on the contrary, state the intent in much broader terms, "with intent to influence Davis to aid in committing a fraud on the United States, to wit, to conceal certain items." This is a difference [8] of which I shall say something more later.

Mr. Foreman and members of the Jury, with respect to the evidence, do you find any difficulty in connection with the question as to whether Roger S. Davis was an employee of the United States, was there any doubt in your mind with respect to that item? The evidence, as you will recall, came in part from Mr. Davis, himself, on that point, and in part from others associated with him in the Internal Revenue Service.

Mr. Foreman and members of the Jury, do you find any doubt in your mind with respect to whether he was acting in an official function? Again, with respect to that matter, Mr. Davis and his associates in the Internal Revenue Service testified.

Mr. Foreman and members of the Jury, do you find any doubt with respect to whether the defendant Lopez knew that Davis was an agent and was acting in his official capacity as such? Here, is it not correct, that the defendant, himself, testified in a way which helps you to answer the question.

With respect to the items of actual transfer and of promise of transfer of things of value, have you any reasonable doubt? You have before you as physical exhibits a bundle of $420, relevant to count one. You have a bundle of $200 as an exhibit with reference to count two, and you [9] have a record, as well as other kinds of testimony, with respect to the promise in connection with the $200 mentioned in count three, and the expense-paid weekend referred to in count four.

You heard the government's counsel, Mr. Madden, say to you that so far as he recalled all these items stood uncontradicted. It is up to you whether you do or do not agree with him.

I now come to the remaining essential element in connection with the crime. You will recall that when I read to you from count one, I called to your attention that that count states that the Grand Jury charges the defendant with intent to induce Davis to omit to do an act in violation of his lawful duty, to wit, to refrain from making an examination of the books and records relating to sales and receipts of the bar and lounge at Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960 and the first two quarters of the year 1961, from computing a cabaret tax on said sales and receipts, and from reporting the same to the Internal Revenue Service.

Now are you persuaded beyond a reasonable doubt that the defendant had that particular, specific intent, to wit, to keep Davis from making an examination of the books and records, or, on the contrary, are you of the view that the defendant correctly testified when he said that he [10] made available all the books and records, and that he was willing to have them examined either on the premises or elsewhere?

It is not up to me to say what I believe, but it is up to me to point very sharply to the particular language of this Indictment, and to invite your close scrutiny as to whether that particular, specific intent charge by the Grand Jury is indeed supported beyond a reasonable doubt.

Now counts two, three and four are, as I already noted, differently drafted. There, unlike in count one, the specific intent which the Grand Jury says Mr. Lopez, the defendant, had was an intent to influence Davis to aid in committing a fraud on the United States, to wit, to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret

tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter.

The Grand Jury does not say, and you do not have to say, whether any cabaret tax was due. The Grand Jury said that the intent was to influence Davis to aid in committing a fraud on the United States, to wit, to conceal any cabaret tax due, and that may fairly be construed as any cabaret tax that may be due. The government does not have to prove that the cabaret tax was indeed due.

[11] An Internal Revenue Agent's general authority, particularly the general authority being exercised at this moment by Mr. Davis, included an investigation as to whether amounts were due. Very often, of course, the government makes investigations to discover whether or not a tax is due, and a bribe designed to prevent the agent from doing what he ought to do can fall within the statute whether or not a tax would ultimately be found to be due by an accountant or by a Court or by any authorized, experienced and knowledgeable tribunal or individual.

Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.

Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account

of dancing, if there were, Agent Davis obviously, [12] in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.

Now the law with respect to entrapment is this: if a government agent by improper means or over-bearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the [13] preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means.

Now there are a few other things that I ought to say in view of the way the case came in. You, of course, know that in matters before you, you generally take, and you will in this case take with you to the jury room, the physical ex-

hibits, whether they be in the form of dollars or whether they be in the form of statements which actually were introduced in evidence. You do not take with you the oral transcript.

Now in this case there was introduced in evidence before you as a physical exhibit the wire recording of what happened, or is said to have happened, on October 24, 1961. There was not introduced in evidence the transcript prepared from that wire recorder. You will not, therefore, have with you that transcript or, as it were, a translation from wire into letters. However, with respect to that, as with respect to all other oral testimony, you are, if you are in doubt, entirely free to come back and in writing put to me by the Foreman ask to have that part of the testimony read to you.

I also ought to call to your attention the fact that [14] there was a lot of discussion about a hearing on the 17th of January, 1961. That was a hearing before me as a Judge sitting without a Jury in connection with a motion preliminary to this case. That whole record is not available to you. It is not part of the evidence in this case. However, if any particular questions and answers from that January 17th proceeding were used by counsel in examining a witness in this case, then so much of the transcript of this proceeding in this case as incorporates that proceeding in the earlier case is part of the record and can, if you find it necessary, be read to you.

I cannot avoid referring to one aspect of the argument put to you by Lawyer Davis. I mean no impoliteness in referring to him as Lawyer Davis. I merely want to make it clear I am not referring to the Agent, who was the witness. The counsel said to you that it was indecent of the government to rely upon this wire recording.

Now, Mr. Foreman and members of the Jury, I want to make it quite plain that this was not a case of what is con-

ventionally called "wire-tapping." It is not a case in which an instrument was placed in a room or building and from that instrument electronic signals emanated so that they were picked up at a distant point by a recording device which may or may not be operated by somebody not in the presence of the defendant.

[15] In this case you are dealing with a wire recorder carried on the person of an individual who was invited, according to the testimony, if I remember it correctly, to return to the premises of the defendant Lopez. No one would doubt that if on that particular occasion Agent Davis had had in his hand a pad, he could have recorded on the pad what was said, nor would anyone doubt that if Agent Davis had a letter-perfect memory he could, after the record made on his brain by the conversation, go to another place and discharge his brain by putting the items on a piece of paper in the office of the Internal Revenue Service.

What we have here is a recording on a device, and the Court of Appeals for the Ninth Circuit and this Court have ruled that that is not any violation of the search and seizure or other provisions of the Constitution of the United States.

I do not mean to say that the case of the wire recorder is a perfect analogy to the case of the yellow pad carried into the room because ordinarily, though not always, a person who is making notes on a pad, or on his cuff, or somewhere else, is observed by the person whose remarks are being taken down, and in a sense it is true unquestionably, unquestionably, that this kind of device of a wire recorder would surprise and infuriate many people. But the issue is not whether they are surprised and infuriated. The issue [16] before a Jury is whether the testimony so taken is believed by them to be true.

Now, Mr. Foreman and members of the Jury, cases on the criminal side are always painful. But you are to bear in mind that in issues of this kind evidence is offered by

people who testify with the expectation that you will perform your duty honorably, and that in passing on the credibility of witnesses you will remember that the credibility of each witness, not only the defendant, may easily be involved in your verdict.

Is there anything else?

Mr. Madden: No, your Honor.

Mr. Davis: No, your Honor.

The Court: You may retire to consider your verdict. At 12.30, more or less, you will be taken to lunch. When you are ready to report your verdict, I will be here.

[The Jury returned a verdict of Guilty on Counts 2, 3 and 4]

[8] Mr. Davis: If your Honor please, I would like to make a short statement that might aid the petitioner in the presentation of his case this morning, and set forth clearly what we are intending to prove.

The defendant contends that the government agent Davis on October 24, 1961 solicited and obtained permission to enter into the defendant's private office, where the defendant conducted his business affairs in private, having declined to sit and talk on the occasion in the public area of the premises, namely, a bar of the dining-room, and that he obtained this permission by misrepresentation of the status of his entry.

The defendant contends that the use by the government agent of an electronic device recording stafements made by the defendant in these circumstances to transmit the statement to agents outside of the premises is a violation of the defendant's rights under the Fourth Amendment, and that the evidence transmitted to the Agents otuside should be suppressed, and the use of the recorded statement by the Agent Davis likewise should be suppressed.

The defendant contends that the status of the entry by Agent Davis on October 24, 1961 relates to the [9] said Agent's visit to the said premises in his official duty on October 21, 1961, and his actions in connection therewith on that date.

It is the position of the defendant that on October 21, 1961 sometime around 8 to 8:30 p.m. that the said Agent had come to the said premises and had agreed with the defendant to return at a later date, namely, either Monday or Tuesday, which would be October 23 or October 24, 1961, on his own time to prepare 720 Forms for Cabaret Taxes actually due to the government by the defendant, and to perform such work as was incident thereto, and that he was being paid and to be paid for such services alone.

It is the position of the defendant that the acts and circumstances by which the Agent gained entry into the private office on October 24, 1961, as it related to the arrangement agreed upon for his coming, was in effect a misrepresentation.

With that statement, your Honor, I would like to call witnesses. Mr. Roger Davis, step forward, please.

ROGER S. DAVIS, Sworn

Direct Examination by Mr. Davis

Q. Mr. Davis, will you please state your name for the record? [10] A. Roger S. Davis.

Q. Where do you reside, sir? A. Framingham, Massachusetts.

Q. What is your age? A. 26.

Q. Are you married? A. Yes.

Q. And you have a position with the United States Government? A. Yes, I do.

Q. Will you state that to the Court, please? A. Internal Revenue Agent.

Q. How long have you been in that capacity? A. Approximately two and a half years.

Q. Have you training as an accountant? A. Pardon me?

Q. Have you training as an accountant?

The Court: Are you an accountant?

The Witness: I am an accountant. I have passed the State CPA exam. I do not have a certificate.

Q. Are you presently a student at Boston College Law School? A. I am.

Q. In the course of your duties, as a United States Government Agent, did you visit the premises known as [12] Clauson's Inn, on the dates September 1, 1961; October 21, 1961 and October 24, 1961, in connection with the ascertaining of whether a cabaret tax might be due the government from the defendant Lopez in his operation of the business there? A. The first date you mentioned was September 1st.

Q. Approximately September 1st? A. I don't think it was September 1st, but I think it was August 31st.

Q. All right. A. You asked as to that date, did I visit Clauson's Inn?

Q. Yes. A. What was the rest of the question for that date?

* * *

[16] Q. On October 24, 1961 did you come to the premises at Clauson's Inn and talk to the defendant Lopez? A. Yes, I did.

The Court: October 24th?

Mr. Davis: October 24th.

Q. Were you accompanied to the premises by Agents Pelletier and Callahan, who waited outside the premises? A. I was accompanied by them, yes.

Q. Did they wait outside the premises? A. Well, I—

The Court: Yes or no?

The Witness: One did and one didn't, as far as I know.

Q. Who remained outside? A. I don't know.

Q. Will you state to the Court where on the premises of Clauson's Inn, did one of the Agents go at the time that you entered the premises? A. The Cocktail Lounge.

* * *

[17] Q. Where did you meet the defendant Lopez on that occasion? A. Right outside the front desk.

Q. Whether or not you were requested by Mr. Lopez, when you entered and met him there, to sit at the public area known as the Dining Room? A. He asked me to lunch.

Q. What did you say in that connection? A. I said No, I didn't want any lunch.

Q. Were you requested by Mr. Lopez at that time to sit at the area called the Lounge? A. No.

Q. Did you state that you desired to go with him to his private office? A. Yes.

Q. Did you enter the private office of the defendant in the location shown on the chalk pursuant to the request? A. Yes.

Q. Upon entering the private office did you say to Lopez that you had to get back to Boston, that you wanted to get [18] a few things cleared up, that you wanted to get this matter wrapped up? A. Yes, something to that effect.

Q. Something to that effect. Now at that time, while you were in the office, did you have an electronic device on your person for the purpose of recording conversations and occurrences in the private office? A. I did.

Q. Did you have on your person an electronic device that transmitted by sound a recording of the activities and statements made in the office at that time to the Agents Pelletier and Callahan outside the building known as Clauson's Inn? A. I would have to qualify that. You are referring to a second device, in other words?

Q. I would prefer you answer the question.

Mr. Davis: I press it. May I have the stenographer repeat the question?

(The question is read.)

A. This device didn't transmit a recording.

The Court: No. The question is did it transmit by sound? The word "recording" is not in the question.

The Witness: It did transmit by sound.

Q. From where did it transmit the sound and to what place did it transmit the sound? [19] A. Well, it transmitted the sound from my person to the Agents outside the premises in a car.

The Court: Would it not be helpful, if I actually had introduced before me the device?

Mr. Davis: I certainly think so, your Honor.

The Court: At some stage this ought to come in. Have you the device here?

Mr. Madden: I do not have it here, your Honor, but I can get it shortly. I believe this device is in—

Voice: New York.

The Court: Will you describe what the device is, so that there is no problem with respect to it? Give me the manufacturer, the type, and so forth, so far as you have it.

Mr. Madden: Yes, your Honor.

Mr. Davis: May we stipulate on that?

The Court: Go back and have a discussion with the men in the courtroom.

Mr. Madden: One of these men can give us that information, your Honor.

(Mr. Madden confers with three gentlemen.)

Mr. Madden: It was a Schmidt radio transmitter.

The Court: S-c-h-m-i-d-t? A German company?

The Witness: Schmidt. I believe so.

The Court: A Schmidt radio transmitter. [20] What else?

Mr. Madden: Battery operated.

The Court: By agreement this Court will receive as Exhibit A the device itself at any appropriate time. The device shall be regarded as being part of the record. It need not be here at this moment. Is that satisfactory?

Mr. Madden: Yes, your Honor.

Mr. Davis: Yes, your Honor. Thank you.

[Schmidt radio transmitter marked Exhibit A.]

Mr. Madden: If I may at this point, your Honor, in fact it did not transmit any sound.

The Court: Well, you will have to bring that out on cross-examination. There is testimony the other way. I take it that what you are really talking about is transmitted electronic waves, and whether waves be sound is a very difficult problem. Is that what it is?

Mr. Madden: No, it did not work. That is what I am talking about.

The Court: All right.

Mr. Madden: Excuse me. This in fact is what happened. It did not work.

* * *

[21] Q. Taking up the suggestion mde by my brother and His Honor, would you describe to the Court the other device that has just now been referred to in the statements by the Court and the District Attorney? A. I can't give a technical description.

Q. Substantially? A. It is called a minifon, and it resembles a transistor radio, and it is worn in a sling. I wore it in a sling under my arm. It is connected with a microphone, which is fastened around the back of the body and attaches in the front at the stomach by means of a strap beneath the shirt.

The Court: Well, I assume that it is important that this device should be introduced in evidence.

Mr. Davis: Yes, your Honor.

* * *

The Court: Well, we will call this Exhibit B, and that may at any appropriate time be added formally to the record, in the sense of being deposited with the Clerk. It is formally part of the record, in the sense it can be referred to in this court and on appeal, if [22] necessary.

* * *

The Court: That is Exhibit B and it includes both Minifon and the microphone and its connecting, whatever it is, wire, cable, or whatever it is called.

Q. Asking your attention to Exhibit B, I ask you whether you recorded on your person the occurrences as recorded by sound and the statements made in the office on that day? A. The device did record, yes.

[23] Q. It was on your person? A. On my person.

Q. Would you state in connection with that, in what manner, as far as you know, that recording would be transmitted to some place beyond the premises? A. As far as I know, you are referring to the Minifon?

Q. Yes. A. As far as I know, that would not be transmitted to any other place.

Q. Would you explain to the Court the method by which any device is used by you in taking the sound of activities and statements made at that time would be transmitted to outside of the premises? A. I wouldn't know how. I only know I wore this. I don't know how the transmission is effected in connection with it.

Q. Well, outside of any technical knowledge, you had knowledge that that in fact did take place? A. That a transmission took place?

Q. Yes. A. I don't know if it was received. I don't have any knowledge of that. I couldn't—

Q. If it worked properly, whatever the device, it would have transmitted from the place where you were standing to a place outside the premises, is that correct? [24] A. If it worked, yes.

The Court: Now, off the record.

(Discussion off the record.)

The Court: On the record.

Q. Mr. Witness—

The Court: You ought to be able to remember his name.

Mr. Davis: Mr. Davis, yes.

Q. Mr. Davis, following his Honor's suggestion, aside from any technical knowledge, from your own knowledge would you state whether, if the instrument that you had worked, it would transmit by sound the activities or statements taking place in the private office to outside the premises? A. You are referring to the Schmidt or the Minifon?

Q. I am referring to any device. A. The Schmidt would. The Minifon would not.

Q. Was the Schmidt device also on your person? A. Yes, it was.

Q. Both devices were on your person? A. Yes, they were.

Q. Asking your attention to Exhibit B, would that device also transmit sounds from the private office to the public area within the premises to where the agent was located? [25] A. Would it transmit to the—I don't believe to the public area, no.

Q. It would not, as far as you know? A. As far as I know, it would not, did not.

The Court: If I understand correctly, Exhibit B is not a broadcasting device. It is a mere form of recording on your own person things which you hear, is that correct?

The Witness: Your Honor, the Minifon is a self-contained recording device worn on a person. The Schmidt was only a radio-transmitter that recorded nothing.

Q. Having reference to the Schmidt device, I ask you whether or not if it operated it would transmit by sound the activities and statements being made in the private

office to the place in the public area where the Agent was located? A. It would transmit to the vehicle outside the premises.

Q. Would it also transmit within the premises to where the Agent was located, if he had a receiving device? A. I couldn't state that it would.

Q. Do you know whether or not he had a device of any such kind? A. Within the premises?

Q. Yes. [26] A. I don't believe so.

Q. In connection with getting the matter wrapped up, did you introduce from your possession Form 720 and then refer Mr. Lopez to the cabaret tax sections of these forms? A. I introduced to him a Form 720 and showed him a place where an amount of taxes to be designated as cabaret—

Q. Whether or not you brought those forms, as a result of an arrangement made between you and Mr. Lopez on your visit of October 21, 1961? A. This was a blank form that I carried in my briefcase, and I always carry a few of those.

Mr. Davis: May the question be repeated? May I have an answer?

The Court: Yes.

(The question is read.)

A. Yes.

Q. Now, in the occurrences of events on October 24, 1961, after you produced the forms, did you then inquire of Mr. Lopez as to when he started his operation at Clauson's and did you receive the reply that he had been in business there under a lease since March of 1959? A. Yes.

Q. Then did you state to Mr. Lopez that he had never filed a cabaret tax return? A. No, I did not state that he had never filed a return.

[27] Q. In the order of events, did Mr. Lopez then say to you that night, October 24, 1961, in the private office, that he never thought he needed one, that he may have had

music from time to time, but it was never steady? A. In the order of events, what you are referring to did not come at that time, no.

Q. Did Mr. Lopez make that statement on October 24, 1961, that was taped? A. That he never thought he needed to file—?

Q. I repeat, did Mr. Lopez say to you that he never thought that he needed one, that he may have had music from time to time, but it was never steady? A. He did not say that he never thought he needed to file. He did say that he at times had music but it was not steady.

Q. Have you, before you have taken this stand, refreshed your memory by reading over the tape or listening to it? A. Yes, not the tape, no, I haven't listened to the tape.

Q. Do you want to stand on that answer as you just now made it? A. Yes.

Q. In the order of events, did you then state that you wanted to give Mr. Lopez a few figures in regard to his operation? I am referring now to October 24, 1961 in the private office. A. This happened before the previous events that you are [28] referring to.

Q. Allright. It did happen. Now, on October 21, 1961 did you visit these premises, referring to the Clauson's Inn premises, about 8 to 8:30 p.m. and talk with the defendant Lopez?

The Court: Well, now, just a moment. Unless I misunderstood you, you just asked about October 21.

Mr. Davis: That is right, your Honor.

The Court: Previously you asked about October 24.

Mr. Davis: That is right, your Honor.

The Court: So you are in reverse chronological order?

Mr. Davis: That is right, your Honor.

The Court: All right.

A. I visited there approximately at 8:30.

Q. Did you come there alone? A. Yes.

Q. Were there any agents outside who came there? A. No.

Q. Did you come there by pre-arrangement with the defendant Lopez? A. No.

* * *

[29] Q. Now, coming back to the night of October 21, 1961 when you visited the premises there, in your conversation on the occasion did you agree on some basis with Mr. Lopez to fill out Form 720, the cabaret tax, in connection with Mr. Lopez' business at Clauson's Inn in Falmouth, Massachusetts? [30] A. I did not agree to fill out forms.

The Court: The way you give the answer, it would not appear on the record, because you give it with an intonation. Will you explain what you mean?

Q. Will you follow his Honor's suggestion?

The Court: Read the question and the answer, please, Mr. Duffey.

(The question and answer are read.)

The Witness: Your Honor, I didn't agree to fill out the form. That is not my job. What I agreed to was to return to the premises so that he could file a return, if due.

* * *

[34] Q. Now, aside from the reasoning that you have just now given, it was the fact that you said to him, "I will examine—I will set a date, a later date to examine the books?" A. I believe I said, "I will come down next week, if that is convenient with you."

* * *

[37] Q. All right. Do you recollect that at that time, in the order of events, that you said, "If I were to examine your books, there is no doubt in my mind that I would find that you owe from $10,000 to $15,000 for cabaret tax?" A. I don't believe I said that at that time, no.

Q. Did you substantially say that? A. $10,000 to $15,000?

Q. Yes. A. On October 21?

Q. Yes. A. No, sir, I don't believe I said, "if I examined your books I would find that", no.

Q. Did you say that the government was a claim for $10,000 to $15,000? A. The government?

Q. On cabaret taxes? A. Against him?

Q. Yes. A. No, I did not.

Q. You never mentioned $10,000 to $15,000 that night? A. On October 21?

Q. Yes. A. No, I did not, not in the sense the government has a claim.

Q. In what sense, if any, did you use it? [38] A. I don't believe I used that phrase in any sense.

Q. Well, didn't you say that night that there was a cabaret tax owed? A. I said I believed there was a cabaret tax owed.

Q. In what amounts? A. I attempted to come to some figure for that year.

Q. What was your conclusion for the three years, as you stated? A. For the three years?

Q. Yes. A. Well, I don't think he—I take that back. I didn't attempt to arrive at a figure for three years at that time.

Q. Didn't you say at some time $10,000 to $15,000 is what would be owed for cabaret tax on October 21, 1961? A. I don't believe I did, no.

Q. Do you recall that in connection with the statement of $10,000 to $15,000 as cabaret tax due that Mr. Lopez replied "That is a very unfair thing to say, because there are no cabaret taxes due for the period before October 17, 1961". Do you recollect that? A. No, I do not.

Q. Do you recollect him saying that in any connection? A. Will you repeat that question?

(The question is read.)

A. No.

[39] Q. Did you further hear at that time Mr. Lopez say,

"I am not delinquent in my tax. The only cabaret taxes will be due after October 17, 1961, and from that point on I have a record in my books, daily receipts subject to cabaret tax"? A. No.

Q. Did you hear him say in that connection, "So these fabulous figures you have, $10,000 to $15,000, have no basis at all?" A. No.

Q. Did you say in connection with that, "may be more or less"? A. May be more or less what?

Q. $10,000 or $15,000? A. No.

[47] Q. At what time did you finally leave the premises the night of October 21, 1961? A. Approximately 10 p.m.

Q. And when you left, did you say to Lopez that you would come there later? A. As I was leaving, he said, "I will see you Tuesday."

Q. Are you sure it wasn't Monday? A. I'm pretty sure.

Q. Was anything said about Monday? A. I can't recall if anything was said about Monday.

Q. Did you say that you would bring the forms down? A. I just nodded my head as I was leaving. I didn't [48] mention anything about any forms.

Q. You were nodding your head, were you not, with respect to a statement connected with Form 720? A. No.

Q. Well, what did you mean when you nodded your head? A. He said, "I will see you Tuesday", and I just nodded my head.

Q. There was nothing further said about your bringing the form down? A. I was out of the office when he said, "I will see you Tuesday". No.

Q. Let me place that. That night when you were leaving did you say that you would bring down the forms? A. When I was leaving, no.

Q. Did you say it at any time that night? A. I said, "By examining the books I will have the necessary forms".

Q. And you want to leave it now that you never mentioned any amount which you claim the United States Government was owed cabaret taxes on the night of October 21, 1961? A. You mentioned $10,000 or $15,000. I never mentioned that to him.

The Court: Mr. Davis, would you be good enough to tell me how all this relates to your motion?

Mr. Davis: If your Honor please, I will put [49] Mr. Lopez on the stand and connect up what I have stated in my opening statement, and to affirm what has been indicated by my testimony as true. To put it more precisely, I will support by evidence what I have stated in my opening statement through Mr. Lopez—

The Court: Well—

Mr. Davis: —that it was a misrepresentation as to the gaining of entry into the private office of the defendant Lopez by reason of its relation to the previous visit of October 21, 1961, and as to the arrangement agreed upon by which or under which this witness, Mr. Roger Davis, was to come there on the night of October 24th.

The Court: I realize that you are not arguing there was a trespass *ab initio.*

Mr. Davis: I am not.

The Court: Are you?

Mr. Davis: I am not. I am arguing, your Honor—I am precisely staying away from the niceties of real estate law, and I am laying this case on the proposition that permission was obtained through a misrepresentation to enter into the private office.

• • •

[50] EDWARD J. PELLETIER, Sworn

Direct Examination by Mr. Davis

Q. What is your name, sir? A. Edward J. Pelletier.

Q. And your residence? A. 55 Pond Street, Needham, Massachusetts.

Q. Your age, sir? A. 37.

Q. Are you married? A. Yes.

Q. What is your occupation? A. I am an Inspector with the Internal Revenue Service.

[51] Q. What are your duties in that respect? A. My title really is Assistant—

The Court: No, your duties.

A. My duty is to maintain the integrity of the Internal Revenue Service. We do that in a number of ways, through character investigation programs and through our regularity investigation involving service personnel as well as taxpayers.

Q. On October 24, 1961, did you in the company of United States Government Inspector Callahan, go in a car to premises upon which are located Clauson's Inn in Falmouth, Massachusetts? A. On October 24th?

Q. Yes. A. Yes, sir.

Q. Was Mr. Callahan in the car with you? A. Yes, sir.

Q. Was there another can accompanying the car that you were riding in, in which Roger Davis, the Agent, was riding? A. There was another car, yes.

Q. But you went there, you three men, in concert, to carry out an objective with respect to obtaining a statement from Lopez?

The Court: Well, you had a common object first, [52] didn't you?

Q. You had a common object? A. Yes.

Q. What was the common object? A. The common object was to have Revenue Agent Davis talk to Lopez, and to get the conversation back to the 21st, get a general discussion as to what had occurred on the 21st.

Q. Was the object to have that statement transmitted from inside the premises of Clauson's Inn to the outside where it could be heard and recorded by some device by

you and Mr. Callahan? Was that the object? A. I would have to—

The Court: The method, I suppose, not the object.

Mr. Davis: The method. Thank you, your Honor.

A. I would have to say Yes. However, Mr. Callahan and I were not outside the premises. I was not outside the premises.

Q. What time did the car in which you were proceeding arrive at the premises just outside Clauson's Inn? A. I arrived at Clauson's Inn at approximately 11:40.

Q. What equipment, if any, was in the car with respect to receiving sound transmission by another device from within Clauson's Inn? [53] A. The automobile had a portable receiving device which operated in conjunction with the transmitting device.

Q. When you refer to the "transmitting device", do you refer to the device that was on the person of Mr. Roger Davis? A. Yes, a Schmidt device.

Q. Now, when you came there on that occasion, did you go on the premises? A. Yes.

Q. Did you make yourself known? A. No, I did not.

Q. Did you go to the private office of Lopez? A. No, I did not.

Q. Where did you go within the premises? A. I sat in the bar and lounge on one of the stools at the bar.

Q. And that is open to the public? A. Yes, sir.

Q. At any time did you make yourself known? A. No, I did not.

Q. Did you have upon your person any device that would record what was occurring within the private office between Agent Davis and Mr. Lopez? A. No, I did not.

Q. I take it from your duties that you have a sort of [54] general supervision in connection with this type of operation?

The Court: What is this "type of operation". I must

say I don't know whether it has to do with the integrity of the Internal Revenue or it has to do with alleged bribes, or what you are talking about. What does the question mean?

Mr. Davis: I withdraw it, your Honor.

The Court: I beg your pardon?

Mr. Davis: I withdraw it, your Honor, in that form.

The Court: All right.

Q. I put the question this way: Is there a regulation in the Department requiring any Agent who has been offered a bribe or who has reason to believe a bribe will be offered to report to you immediately? A. He is to report, yes.

Q. Immediately, is my question? A. Immediately, yes.

Q. Did you at some time receive a telephone communication from Mr. Roger Davis in this connection? A. I did not.

Q. In the operation of your office, who was the man to whom a telephonic communication should be immediately made, if there was a bribe, or reason to believe that a [55] bribe was to be given?

Mr. Madden: Objection, your Honor.

The Court: Well, that is a fair enough question. To whom, if you know?

The Witness: The Regional Inspector normally, your Honor.

Q. Who was the Regional Inspector? A. Mr. Emmanuel Schuster.

Q. He is here this morning? A. Yes, sir.

Q. But, at any rate, you received no communication? A. No, sir.

* * *

[58] GERMAN S. LOPEZ, Sworn

Direct Examination by Mr. Davis

Q. Will you state your name, sir? A. German S. Lopez.

Q. A little louder so that the Court and the stenographer can hear you. A. German S. Lopez.

Q. Speak just a little louder. A. Lopez, L-o-p-e-z.

Q. What is your residence, sir? [59] A. Falmouth, Mass.

Q. How old are you, sir? A. 58 years of age.

Q. Are you married? A. Yes.

Q. How many children have you got? A. I have two.

Q. How old are they? A. 17 and 27.

Q. Where were you born, sir? A. Cuba.

Q. How long have you been in this country? A. Since 1923.

Q. On October 21, 1961, were you conducting a business at Clauson's Inn, Falmouth, Massachusetts? A. Yes.

Q. Were you also conducting a business there on October 24, 1961? A. Yes.

Q. I show you Exhibit 1 and ask you whether or not you prepared Exhibit 1? A. Yes, I did.

Q. Is it a fair representation of the facts indicated in the chalk? A. That is correct.

[60] Q. On October 21, 1961 between 8 and 8:30 p.m., whether or not you met Agent Davis on the premises at Clauson's Inn? A. I did.

Q. Where did you meet him? A. Between the Cocktail Lounge and the foyer.

Q. What was said by you and what was said by Mr. Davis in the order of events as best you can recall? A. He came in and he said, "I am from the Internal Revenue." Then I said, "I don't remember you."

Q. Did he give his name? A. He did not state his name at that time.

Q. Did he show credentials? A. No, he didn't show me any credentials at any time.

Q. Would you state what conversation ensued, what took place, and where? A. He said, "Have you ever filed your cabaret tax?"

Q. What did you answer to that, sir? A. I said, "No.

I do not need to file a cabaret tax because I do not—I don't think I come under the cabaret jurisdiction."

Q. Then what did he say? A. Then I say, "However, now I do come under the cabaret jurisdiction from the 17th of October on."

Q. Was there anything said about singing or playing or dancing? [61] A. He said, "I understand you have a singer here." "And you also have dancing?" I said, "I do have now a singer, and I do it for the fact that we come under the cabaret regulations supposedly. I took down the sign that says "No Dancing Allowed" along with another sign aside of it which said "Jackets are Requested After 8 o'clock."

The Court: I did not hear that.

The Witness: Jackets are required after 8 o'clock.

Mr. Davis: It may help if I stand over here, your Honor.

Q. Now, would you repeat that again?

The Court: I got it now. Jackets are required.

Mr. Davis: All right.

Q. What next did the Agent say and what did you say? A. He said, "How long have you been here?"

I said, "For approximately three years. It will be three years the first of this coming March."

Then he said, "What kind of arrangement do you have with Clauson's?"

I said, "I have a lease on the restaurant and I manage the lounge."

Q. Then what next was said by you and by Mr. Davis, please? A. I beg pardon?

[62] Q. What was next said by both you men? A. He said, "Approximately how much business do you do here a year?" Approximately how much business do you do here?"

I said, "We do approximately $160,000 in the summer months."

Then he went on to say, "I have to examine your books."

I said, "Well, my books are in my office." "Well, let's go there and talk."

Q. Then what occurred? A. So at that point, when we entered the office, again he repeated that he would have to examine the books. I said, "Go right ahead."

Q. Then what next was said with regard to the books? A. He said, "Do you want me to examine them here or in Boston?"

I said, "It's all indifferent to me." I said, "Whatever you wish." I said, "If you are going to exmine them in Boston, I will have to send my bookkeeper with you, because I don't make the entries."

Q. What did he say? A. He said, "Well, we have to set up—we have to draw up a date, a later date."

Q. Now, then, what next occurred, stating what was said [63] by you and what was said by him? A. He said, "Based on $160,000 sales, approximately how much of that would be liquor?"

I said, "Approximately 40 per cent would be liquor."

Then he started figuring out, a lot of figures on a piece of paper and he said, "Well, based on my figures you will be owing"—no, sorry—"Based on my figures, if they examine your books, you will be owing the government in cabaret taxes from $10,000 to $15,000."

Q. What did you say with respect to that? A. I said, "Where do you get those fabulous, crazy figures?" I said, "That just doesn't make any sense to me." Well, then he said, "Well, maybe more or less."

Q. Well, did you say anything further in connection with taxes, cabaret taxes, at that time? A. I said, "All the taxes that I owe will be for what has occurred from Octo-

ber 17th on, whatever it be from this point on, in the operation."

Q. Whether or not the books would show a special ledger for cabaret taxes applicable to the period after October 17 and which were entered prior to October 21?

Mr. Madden: I don't understand the question.

The Court: I understand it, but I do not think it is very artistically put.

[64] Mr. Davis: I don't, either, your Honor. I will rephrase it.

The Court: Prior to October 21 did you make any entry in your books showing the cabaret tax due?

Q. Would you answer that, sir? A. My answer to that is prior to October 17, to my knowledge, no cabaret tax was due.

The Court: That is not the question.

Mr. Davis: I will try to help, your Honor.

Q. Before October 21, 1961 were there any entries in the books showing cabaret tax due? A. Yes.

Q. What was the date that started? A. That started from October 17. I believe they were entered on the 18th.

Q. All right. Now, when you denied there was any tax due and stated that there was no tax prior to October 17, 1961, what did the agent say in that respect? A. Well, at that time, he took a relaxed, a very friendly mood.

The Court: I can't hear you with your hand up to your mouth.

The Witness: I said at that time, Mr. Davis took a very relaxed manner and he said, "You know, I was here sometime in the first part of September" or some time [65] ago and Mr. Clauson invited me to play golf. I did not accept it."

He said, "However, you have a beautiful golf course here. You have a nice place and I would like to come down to speak a weekend with my wife."

I said, "Please do. Come down and be my guest." So he replied, "Well, I will accept that."

Q. What next occurred, Mr. Lopez? A. From that point on—I said, "Well, I don't know how to put this to you. I don't know how to ask you this. I wish you—if you are willing to help me to file my cabaret tax when they come due, from October 17 on, and prepare my—prepare the form that may be necessary. Let me know whether or not a cabaret permit is necessary—and be able to help me out."

He said, "Well, that all depends."

Q. Then what did you say? A. So I said, "Well, I would like to pay you on account—for the work you to do for me on your own time, I would like to pay you on account some amount."

So I reached in my pocket and I took $200 out of my pocketbook and I reached in the safe and I took another $100 out of the safe.

Q. Where was the safe located? A. Right aside my chair. And I put the $300 on the table [66] for Mr. Davis. Then he said, "That's hardly enough to jeopardize my position."

I said, "I'm not asking you to jeopardize your position. I'm merely asking you to give me your services on your own time."

He said, "Well, that is not enough for me to bother me" —something to that effect.

Q. At that time, when he said that, where was the money? A. The money was on top of the desk.

Q. In the amount of $300? A. In the amount of $300. So I get up from the desk, and I said, "Just a minute. I will see if I can do any better." So I went out to the front desk where the night clerk was working, and I asked him—his name is Gus—and I said, "Gus, do you have any big money available? I mean by 'big money' $10 or 20 bills."

He said, "No, Jerry, all I have is change, small change."

So then I went out to the lounge, where the cashier was,

and I asked her, "Do you have any big bills here, Claudine?"

She said, "I will look." And she looked in the register, and she said, "All I have is $120." So I came back with $120 and I put it on top of the $300.

He said, "How much is there?"

[67] I said, "This $300 and this $120 is $420." "$420"? "Well", he said, "it's hardly worth my time. It hardly pays for my time" or something along those lines.

Q. Now, I ask you, when you left your private office and went to what you call the front office and returned, during all of that time was the $300 on that desk? A. Yes, all the time.

Q. And was Agent Davis within that private office during all that time as far as you know? A. All by himself, while I was gone for three or four minutes.

Q. I ask you to point out on Exhibit 1 where the front office is. A. The front office is right here. (Indicating) From there I went into the lounge.

Mr. Davis: He points on the chalk here, your Honor. The front office that he is talking about is here (indicating).

Q. When you came back, what further was said by either you or by Mr. Davis? A. Then when he made the statement that it was hardly enough, "to pay for my time", I said, "Well, at a later date, when you come back again, I will talk to you further. I will talk to you again at a later date when you come back." I didn't mention any specific time. [68] He said, "Well, I think I will be back Monday or Tuesday of next week."

"That's all right."

I said, "When you do come back, call me so I may be here."

Q. Now, asking your attention to October 24, 1961, I ask you whether or not on that date you met and talked with Agent Davis on the premises? A. Yes, I did.

Q. Where did you meet him? A. I met him on the same location between the cocktail lounge and the foyer.

Q. Will you point out the foyer, please, on Exhibit 1? A. Yes, sir. This is the lounge. Right in this location right here, between the foyer and the cocktail lounge (indicating).

Mr. Davis: Here, sir (indicating).

Q. Will you state to the Court what occurred at that time, giving the conversation between you two men? A. I led him to the dining-room and I said, "Will you sit down? Let us have lunch."

He said, "No, I don't care for lunch." I pointed out to the next room and I said, "Let us sit over here and talk."

He said, "No, I am in a hurry. I have another [69] appointment in Boston. Let's go to your private office."

So I immediately went running to my private office.

Q. Then when you got into your private office would you state what occurred, please? A. Well, he put his brief case right on the floor between two chairs. He said, "Well, let's wrap this here up" or something to that effect. I have to go back to Boston quickly."

Q. What else occurred at that time? A. Then he pointed out a form, and he pointed out to me—"This is the form, the cabaret tax form that you are supposed to have" or something to that effect. He looked very unusual—to my mind he came in only for one purpose and—

Q. No, just answer the question, sir. A. And he says—

Q. Please don't. A. I'm sorry.

Q. What time did he arrive, sir? A. I would say approximately around 1 o'clock in the afternoon.

Q. Now did a line of questions and answers then ensue? A. Yes.

Q. State them as best you can in the order they took place. [70] A. Well, the details—

Q. To refresh your mind, was the subject brought up? A. Again he mentioned about—

Q. As to when you started the operation?

Mr. Madden: Excuse me, your Honor.

The Court: It is a little confused at this moment. Would you put the question again, Mr. Davis?

Q. Refreshing your memory, if you have exhausted your memory for the moment— A. He said, "How long have you been here?" Again I repeated, "I am here about three years next March." And again the question came up, he said, "How much business do you do here?"

Again I repeated, "About $160,000 in the summer months' operation."

Again he asked, "Based on that, how much is the liquor sales?"

I said, "Approximately 40 per cent." More or less the same as the previous questions.

He said, "You know, based on that amount", he says, "you owe the government"—and he started figuring again on paper, a lot of figures, for several minutes, and he came out with some outrageous figures which looked like august to me, and I said, "That's an august statement to make," or something to that effect.

[71] The Court: "August" what?

The Witness: Statement to make. "I don't owe the government any cabaret tax prior to October 17th."

Q. Well, now, after that whether or not there were a series of questions and answers made between you and Mr. Davis, he putting the question? A. Well, he—

Mr. Davis: May I strike that out, if your Honor please.

Q. How long after that occurred did the agent remain in the private office? A. I would say approximately, I would say 25 to 30 minutes approximately.

Q. During that time there was a conversation and discussion between you and him? A. Yes.

Q. After Mr. Davis left the premises on October 24, 1961, what did you do with reference to Mr. Davis?

Mr. Madden: I pray your Honor's judgment.

Mr. Davis: I will put it in another form, your Honor.

Q. When Mr. Davis left the premises, what did you do?

Mr. Madden: I pray your Honor's judgment.

The Court: I will hear what the answer is. What did you do?

[72] The Witness: What day? On the 21st?

The Court: The 24th.

Q. The 24th. A. On the 24th? At that time—

The Court: No. What did you do?

The Witness: I became rather suspicious of his actions. They did not comply with the previous meeting that he had with me, and I called the Police Department in Falmouth to try to get some information. I asked my bartended to take a notation of the registration number of this man just stepping out of the lounge with a briefcase. So he did come back with the car registration number. And immediately I called the Police Department in Falmouth, and I stated, I gave the number, and they called me back some time later, and they said, "The name is registered under somebody in"—I have forgotten the name—I believe now I have it—in Reading, somebody in Reading. Whether or not that was the correct answer, I don't know.

Then the following day I called the Office of Internal Revenue here from my office and I again asked—I give the two names, Mr. Edward Davis and the name of this other party that the car is supposed to be registered under—and they said, "Mr. Davis? Yes, he is an agent in the Tax Department. This other party we do not recognize the name." Then I was satisfied that Mr. Davis was not [73] an imposter, that he was an Agent, and then I felt relaxed.

Q. What is the name of your bookkeeper? A. Homer Dion.

Q. Is he present in court today? A. Yes, he is.

Q. Between October 17, 1961 and October 21, 1961, did you consult with him about making entries in the books referrable to cabaret tax? A. Yes, I did.

Q. Whether or not there were any directions made to him with respect to communicating with the Internal Revenue Agent in connection with making up proper forms and establishing the facts for a cabaret tax before October 21, 1961? A. Yes, there was.

Q. Yes is the answer? A. Yes.

Q. All right.

[85] The Court: A disappears from the case because it did not work.

Mr. Davis: We are not talking about that.

The Court: All right. We are dealing only with Exhibit B.

Mr. Davis: As I understand it now, with respect to Exhibit B, it did not transmit?

The Court: Exhibit B operated but transmitted only around the body of Davis. It transmitted from one place on the body to another place on the body, but not outside the building.

Mr. Davis: So that I understand the facts, it was not used as such to transmit, or as a medium by which sounds would be transmitted outside. I understand that to be the fact. So, therefore, that would seem to be moot, too.

The Court: Yes. The whole of the motion is founded upon what turns out to be a misapprehension of the actual facts.

Mr. Davis: It would seem so, your Honor.

The Court: You agree, don't you, Mr. Madden?

Mr. Madden: Yes, your Honor, I do.

The Court: The motion is, therefore, denied.

Mr. Davis: Excepting, your Honor, there is one [86] thing remaining, and I would like to address myself to it, before you deny the motion.

The Court: Well, I cannot deny a nonexistant motion.

Mr. Davis: No. Before you deny the petition. I address myself to the recording on the person of Agent Davis. I address myself to that, and in that respect I argue that on the evidence, that the statement as taken by Agent Davis on the circumstances as described, if believed by your Honor, with respect to the defendant Lopez, would constitute an entry into the private office of the defendant Lopez under a misrepresentation, and consequently that the evidence would have been obtained in violation of the Fourth Amendment, and as such, pursuant to the petition, I think that that evidence should be suppressed.

The Court: As I understand it, you believe that if under all the circumstances Mr. Davis had had a pad of paper in his hand and a pencil, and had it during the time he was in the inner office, made a notation on the pad of paper, that particular notation also ought to be suppressed because of the surrounding circumstances and the misapprehension under which he was admitted to the office.

Mr. Davis: I respectfully suggest, your Honor, that I think the analogy is a little too wide.

[87] The Court: Well, it is prefectly clear that your theory is that the individual was admitted under a deceptive statement and, therefore, everything that was taken within the inner office was taken as a result of admission by deception.

Mr. Davis: That is right, sir.

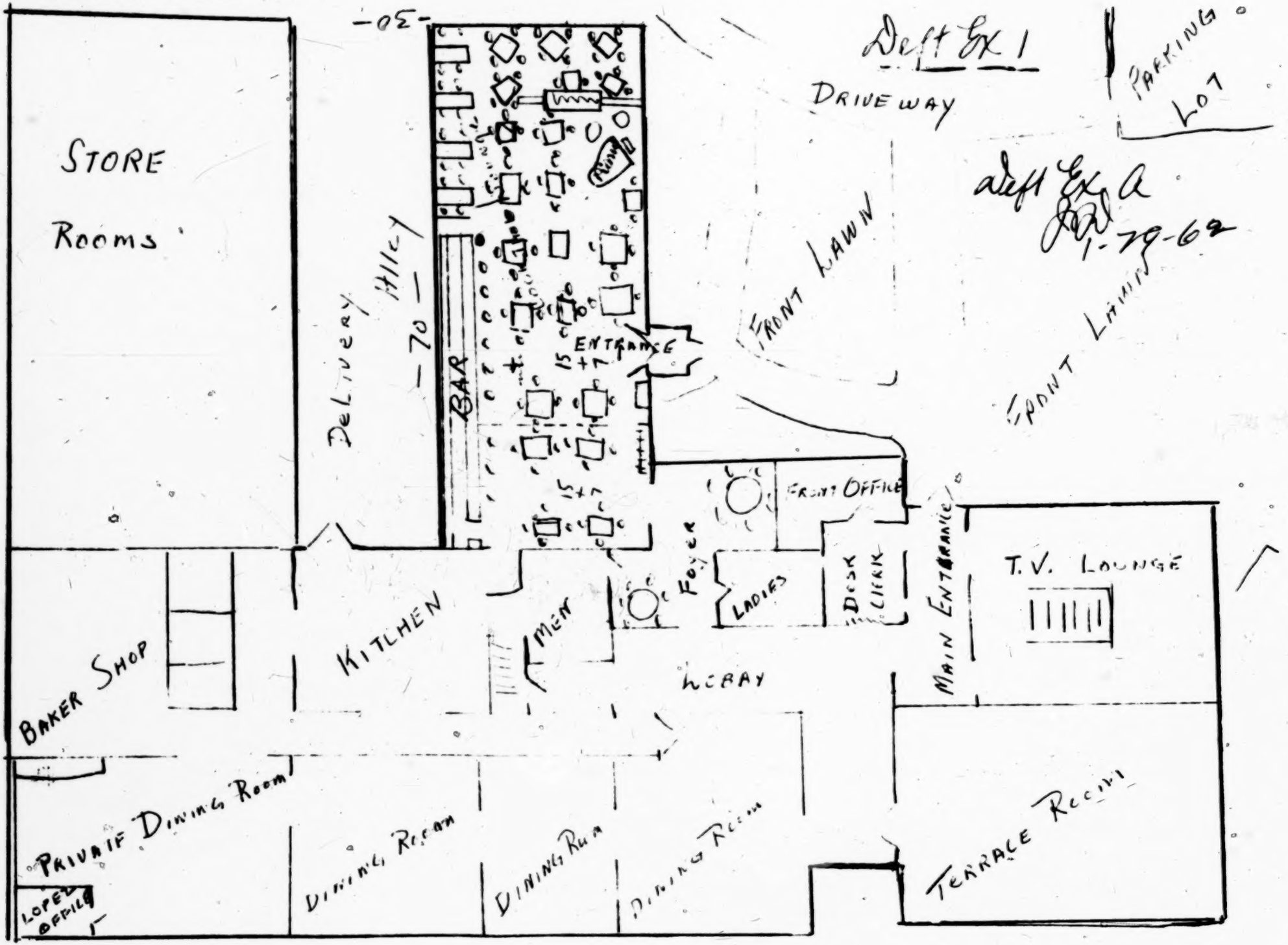
The Court: So it applies to notes on a piece of paper as well as notations upon a wire recorder.

Mr. Davis: Well, if the paper—there might be a different state of facts on a piece of paper. If it was open and obvious that that was being done, that would be one

thing, and I think probably distinguishable from an electronic device, which is secret.

The Court: Well, I understand the argument you make. It seems to me a distinction without a difference. The petition and motion are denied.

DEFENDANT'S EXHIBIT A



DEFENDANT'S EXHIBIT D

61-307
Defts Ex 6
for I-30-62

1					1
2					2
3					3
4					4
5					5
6					6
7					7
8					8
9					9
10	1961				10
11	Oct	16	Change in policy of entertainment. From this date Liquor Sales subject to Cabaret Tax during		11
12			entertainment hours. This Tax is to be deducted from Beverage Sales which are subject to sales charge.		12
13					13
14					14
15					15
16					16
17					17
18					18
19					19
20					20
21					21
22					22
23					23
24					24
25					25
26					26

S. L. & S. VERNON, INC.
NEW YORK
A 1948
AN ORIGINAL LEDGER

[fol. 170]

• • • • • • •

A. What was the rest of the question for that date?

Q. Well, I will confine it for the moment to that date, August 31, 1961. Did you visit the premises in connection with your duties?

A. In connection with my duties, yes.

Q. Did you seek and talk with the defendant Lopez on that day?

A. I did.

Q. State the substance of the conversation.

A. On the first visit, which I believe was August 31, I saw Mr. Lopez during the day hours, I would say about 12 noon, sometime around that. First, I asked—I didn't know it was Mr. Lopez who was running the bar. First, I asked to see the Manager, or the owner of Clauson's Inn, who was Mr. Clauson. He was present at that time. I identified myself with my commission. I asked him if he had any—if there was any entertainment on the premises. I also asked—oh, he said that he would refer me to the Bar Manager, the fellow who ran the restaurant and lounge. He called—

Q. Who is the "he" you are referring to?

A. He called the gentleman he referred to as Mr. Lopez. At that time I spoke to Mr. Lopez. I identified myself and I asked him if he had any entertainment which consisted of singing or dancing in his bar and lounge during the evening hours, and he answered No.

Q. What else occurred?

A. I asked him if he in any way advertised or was Clauson's Inn advertised in any way dancing or singing or other forms of entertainment, since that was the only area in Clauson's Inn where there could be any entertainment, and he said No.

I then showed him a copy of the Cape Cod Guide, in which there was an advertisement which states that Clauson's Inn had dancing, I believe dancing and entertainment, or one or the other.

Q. May I interrupt you, sir?

A. Pardon?

[fol. 171] Q. May I interrupt you?

Mr. Madden: If your Honor please, may he finish the answer?

Mr. Davis: I have no objection.

The Court: I think he had finished.

Mr. Davis: I have no objection if he wants to.

The Court: You may finish it. Is there anything else you want to say beyond you showed him the Cape Cod Guide?

The Witness: I showed him the advertisement, which stated there was dancing, and that was the reason for my visit, and he said he didn't know anything about it. At that point I asked to see the premises itself.

Q. Whether or not he showed you an advertisement that he had in a local paper at that time which concerned the operation he was running, and that there was no mention of dancing?

A. Whether he showed me that, I don't recall whether he did.

Mr. Davis: I will hurry on, your Honor, and I will come back to that.

Q. Now, what time did you arrive at the premises on August 31, 1961?

A. August 31?

Q. Yes.

A. What time did I arrive? I would say about 12 noon.

Q. How long did you stay there?

A. Well, Mr. Lopez—

The Court: No.

A. I stayed there, I would say, about one-half or three-quarters of an hour.

Q. Isn't it a fact that you first stayed on the premises at Clauson's Inn for that period of time and then later went over to another part of the general premises, and then returned and stayed there until about 9 or 10 o'clock that night?

A. I returned later that evening, yes.

[fol. 172] Q. And did you observe the premises during the evening of August 31?

A. I did, yes.

Q. Did you see any singing or dancing there?

A. I saw dancing.

The Court: You saw dancing?

The Witness: I saw dancing, yes, your Honor.

Q. Was there a sign there "No Dancing Allowed"?

A. There was no sign saying "No Dancing Allowed".

Q. Did you make a report of that to anyone as to the dancing?

A. To—?

Q. To anyone?

A. Yes, I did.

The Court: I do not understand what you mean by "saw dancing". Do you mean you saw guests dancing or you saw dancers of a professional nature?

The Witness: I saw patrons dancing, your Honor, couples.

Q. Where was the dancing?

A. On the dance floor, which is, just on the floor of the lounge.

Q. I show you a chalk, representative or supposed to represent in a rough way the floor plan of Clauson's Inn, and I ask you, is it a fair representation of the location of the rooms, particularly the lounge room, the dining rooms, the foyer and other rooms?

A. Well—

The Court: Is it or isn't it a fair representation?

The Witness: As far as the lounge, it is, and the foyer, it is.

The Court: Admitted as Exhibit 1.

[Sketch marked Exhibit 1.]

Q. I hand you Exhibit 1 and I ask you, do you see on there Lopez office, designated as such?

A. I see it, yes.

Q. Is that where it was located?

A. Well, I was down there two months ago. I can't—

The Court: You do not have to tell us all the reasoning powers that you go through, but give us an answer.

The Witness: I believe that is where it is located, yes.

[fol. 173] Mr. Davis: Right here, your Honor (indicating).

* * * * * * *

Q. All right. Do you recollect that when you came to the premises on October 21, 1961 that you asked Lopez, "What kind of business do you run here, and what contract do you have with Clauson?"

A. I asked him the nature of his business, yes. And I asked him what type of arrangement he had with the Clauson's Inn.

Q. What did he say?

A. He told me he leased the bar and managed the restaurant. I think those were his words, or perhaps the other way around, and that he paid—

Q. Excuse me.

A. He paid a percentage of his gross receipts to the Clauson's Inn.

Q. Did you recall that you then said, "How much business do you do here?"

A. Yes, I did ask him that.

Q. Do you recall that Mr. Lopez said, "On the premises here we do approximately $160,000 in the summer months"?

A. He said $160,000. He didn't say "summer months".

Q. Did you recall at that time that you then said, "We will have to examine your books?"

A. I stated at the outset that I believe that an examination was necessary on that October 21 visit.

Q. Did you ask him where the books were?

A. I asked him where his books were located, yes.

Q. Where did he say?

A. At Clauson's Inn.

Q. Did he say where they were in Clauson's Inn?

A. He said he had an office there.

Q. Did he say they were in the office?

A. He did not. I don't believe he said they were in the office. He said they were at the premises there.

Q. Well, do you recollect—is your memory exhausted in that connection?

A. No.

Q. Well, now, do you recollect that you went to the office, the private office at that time?

A. I went there during that evening, yes.

[fol. 174] Q. Do you recollect that when you got into the office you said, "I will have to examine the books"?

A. I did not say that I would have to—are you referring to that evening?

Q. Sir, to make the record clear, on October 21, 1961, on Clauson's premises between 8 and 8:30?

A. I stated words to the effect that I would have to examine his books and records, that I should examine his books and records, at a later date.

Q. Do you recollect that Lopez then said, when you said that you would have to examine the books, "Go ahead"?

A. He did not.

Q. He did not?

A. He did not.

Q. Did you question him as to whether or not he would want to have the books examined at the Inn or in Boston?

A. I asked him whether it would be convenient—which place would be convenient for him.

Q. What did he say?

A. He said that—he stated words to the effect that, he did not look forward to the prospect of having an examination of the books.

Q. Isn't it a fact he said—it was indifferent to him whether they were examined there or in Boston, that his bookkeeper would have to go to Boston?

A. No, that is not a fact.

Q. Well, at any rate, you said at that time, "I will set a date later to examine the books"?

A. I don't believe I said that I would set a date later, no.

Q. Do you recollection (sic) what you said this morning in connection with that just now?

A. Yes, I said I would examine at a later date. But in referring to that, to explain that, the cabaret returns are filed every quarter, that is, every calendar quarter every three months. Since this was October 21, that meant that a return, if due, for the third quarter of 1961, would have to be filed by October 31 in order to incur no penalty.

And this left ten days between the 21st and the 31st of [fol. 175] October. And naturally, I felt that part of my job was to expedite matters—so that any returns filed by any taxpayer should be filed promptly so as to avoid a penalty, which is 5 per cent a month.

Q. Aside from—

A. And may I finish?

Q. Surely.

A. Therefore I suggested that we should—that I should look into this to see if there was a tax due, and how much, promptly, so that he could file a return, if due, before the end of October.

Q. Are you through, sir?

A. Yes.

* * * * * * *

Q. Does that comprise the entire conversation with respect to the books?

A. With respect to the books? I believe there wasn't too much—

Q. There wasn't too much said?

A. —about the books. He didn't want them examined.

Q. I didn't ask you that.

A. Yes.

Q. I did ask you whether or not you said to him, "I will set a date to examine the books later"?

A. I didn't say I would set a date. I said I would come down next week, if that is convenient with you, or words to that effect.

Q. Was that the extent of what you said?

A. Yes.

Q. With respect to the books?

A. With respect to examining the books.

Q. Do you recall that about that time you said to Lopez, "Based on the amount of business that you have told me, namely $160,000, how much of that would be liquor?"

A. I didn't ask him how much of that would be liquor, no.

Q. You don't recall that?

A. The amount of liquor as such isn't relevant to the—

Q. Is that so?

A. Yes. Liquor can be sold—as far as I know, it can be sold all day without entertainment or with entertainment.

Q. Have you in mind Exhibit 1 in this case?

A. What is Exhibit 1?

[fol. 176] Q. The chalk showing the location of the premises.

A. Yes.

Q. Referring you to Exhibit 1, more particularly to the Lounge, I ask you where the dancing would take place with respect to the lounge?

A. In your chart you have, I believe this refers to tables, these blocks with circles around them?

Q. Yes. It refers to the lounge.

A. In this area, the front of the bar, the tables were cleared away.

Q. Was there food served on the lounge?

A. I didn't see any food served.

Q. Why wouldn't any tax, if there should be a tax due, predicated upon dancing, be confined to liquor only?

A. I believe the law reads "food or drink".

Q. You know no food is served in the lounge?

A. There was drink.

Q. But no food?

A. Yes. Excuse me. May I add something? There was also liquor served in the dining-room.

Q. You know there was no dancing in the dining-room?

A. I don't believe there was any dancing in the dining-room, no.

Q. Do you recall that Lopez said with respect to the figure of $160,000 "approximately 40 per cent"?

A. With respect to the figure of $160,000, I asked him not how much liquor he sold but how much sales took place in the bar and lounge.

Mr. Davis: Your Honor, may I press the last question?

The Court: Surely.

(The question was read.)

A. 40 per cent of that were sales in the bar and lounge. That is what he said.

Q. Did you have any difficulty with my previous question,

when I asked you—"Based on the amount of business you have told me, namely, $160,000, how much of that would be liquor?"—have you any difficulty with that question?

A. Yes, because I didn't ask him how much of that would [fol. 177] be liquor. I asked him how much would be sales in the bar and lounge.

* * * * * * *

Q. At this point in your questions of the defendant Lopez, did you shift the subject and ask the question, "By the way, when I was here some time ago, Mr. Clauson invited me to play golf, and I did not accept the invitation. However, I would like to come down here and spend a weekend with my wife. It is a lovely place, and you have a fine golf course." And did Mr. Lopez say in that connection, "Please do, and come down as my guest"? And did you say "I think I will accept that". Did that occur or any part of it?

A. I did not make that statement.

Q. At all?

A. That I wished to come down there?

Q. On October 21, 1961.

A. I did not state I wish to come down there with my wife.

Q. What did you say with respect to coming down to play golf?

A. During the course of the conversation, he asked me to come down with my family to stay, and I answered No, that I would not.

Q. Isn't it a fact you introduced that subject?

A. No, it is not.

Q. At what point, in what connection, was that subject matter introduced?

A. Mr. Lopez introduced that.

Q. In what connection?

A. In connection with an occurrence of paying me money not to examine his books.

Q. Well, you have already said everything that had been said by you in connection with the books and their examination that occurred on that night?

A. I have stated what I said in connection with the books.

Q. Now, then, immediately after that, the subject matter of coming down to play golf with your wife, in that sequence of events, didn't Lopez substantially say to you, "I don't know how to ask you this. I would rather have you as a friendly agent than as a belligerent one, because I can't [fol. 178] take belligerence. I work awfully hard for the money I am getting. So would you be willing to help me to prepare and file my cabaret tax, and whatever is necessary to make it up? I would like to have you guide me how soon I should file it, and if i have to have any special cabaret permit here. I would like to have you do this on your own time, and I will pay you for it."

Did he substantially say that?

A. On October 21 he did not substantially say that.

Q. Did he say any part of that?

A. You read a long statement. Would you take it—

He didn't say it in the order of events you have it, either.

Q. Sir, I show you a paper from which I read that question. Did he say, "I don't know how to ask you this. I would rather have you as a friendly agent than as a belligerent one, because I can't take belligerence"?

A. No, he didn't say that.

Q. Did he say, "I work awfully hard for the money I am getting, so would you be willing to help me prepare and file my cabaret tax, and whatever is necessary to make it up?"

A. No, he didn't say that.

Q. Did he say anything with respect to that? He said, "I work awfully hard."

Did he say, "I would like to have you guide me how soon I should file it, and whether I have to have any special cabaret permit here."

Did he say that?

A. I don't know—

Q. Substantially, did he say that?

A. No, he did not.

Q. Did he say anything similar to it?

A. No, he did not say "how soon".

Q. Did he say, "I would like to have you do this on your own time?"

A. No.

Q. Did he say, "I will pay you for it"?

A. He said he would pay me, but not in connection with—
[fol. 179] Q. He said he would pay you. Now, whatever you claim he said in connection with payment, did you reply, "That all depends"?

A. No.

Q. Did Mr. Lopez at that time in that connection say, "Whenever you want, come down, bring the necessary forms and do whatever is necessary about making up the return."

A. He did not say "whenever you want." He said, he referred to the following week, and as far as filing a return, I told him I felt I could come down soon and examine his books. I didn't say which quarter to file a return. I said I would like to examine his books.

Q. Do you want to have the record stand as now on your statement that you said to him that you would come down later and examine the books?

A. He suggested that I come down. Let me strike that. Mr. Lopez offered me money.

Q. Wait a minute.

Mr. Davis: I object to this, your Honor. I think that I am entitled to a responsive answer to the question.

The Court: You are.

A. I tried to stall him off.

Q. Just a moment.

The Court: Please read the question, and then it may be answered.

(The question is read.)

A. Yes, I stated that I would come down the following week and examine the books, if it was convenient.

Q. Now, at about that time, and in the sequence of occurrences, didn't Lopez then take out $200 from his pocket and $100 out of the safe and say, "I am willing to pay you on account for these services?"

A. Well, sir, you have the sequence of events mixed up. As far as my own knowledge, as far as—you say he took $200 out of his pocket—?

Q. And $100 from the safe?

A. I don't know from where he took the money, out of

his pocket or out of the safe. I know he counted it under [fol. 180] the desk and placed money on the desk, and I asked him how much was there, and he said $200.

Q. We are in agreement that at that time there was $300 actually, physically placed on the desk in your presence in the private office?

A. No. I said $200.

Q. Well, then $100 was added to it right then and there?

A. No.

Q. Wasn't that $300 placed on the desk at some time?

A. No.

Q. You say no?

A. That's right, no. He placed money on the desk and I asked him and he said $200.

Q. Well, wasn't there $100 added to the $200?

A. No, not $100.

Q. You say that wasn't the fact?

A. That is not the fact.

Q. Don't you recollect that $300 was placed on a desk in the office and that you said "That is not enough?"

A. $300 was not placed on the desk and I did not say that was not enough.

Q. Did you say in connection with $300, "That is hardly enough to jeopardize my position"?

A. No.

Q. Did Mr. Lopez say to you, "I am not talking about anything that might jeopardize your position. I am merely asking you for a personal service on your own time, if you wish to do so, to prepare cabaret tax returns that will be due?"

A. He did not.

Q. At some time was there a certain amount of money placed on the desk?

A. Yes.

Q. And at that time did Mr. Lopez leave the office and go to another point on the premises?

A. With no money on the desk, he left the office—there was no money on the desk.

Q. Well, at the time he left the office, whether or not there [fol. 181] was a producing of some amount of money?

A. He left the office before any money was produced.

Q. Before he left the office, if money was not produced, was there an amount of money stated by him or by you?

A. I don't believe so.

Q. You say there was neither the production of money nor a statement, either by him or you, with respect to an amount before he left the office?

A. He left the office before any statement—he made any statement about any payment of money to me.

Q. At some point in connection with some amount, you said, "That is not enough", is that correct?

A. No.

Q. At ano (sic) time?

A. I didn't say, "That is not enough".

Q. At no time?

A. At no time.

Q. And you say there was no talk at any time with regard to $300? You understand that?

A. $300, the sum of $300 as such did not enter into the talk.

Q. Now, in connection with that, in connection with an amount of money mentioned, did Lopez say to you, "That is the best I can do"?

A. He said, "That is the best I can do now. When you come down, I will give you more later", or words to that effect, "I will give you more later at Christmastime."

Q. Now, at some point did you say in connection with some amount, "That is not enough for me to waste my time with you?"

A. No.

Q. Was there an interval at which there was a talk either of production of money or the mention of an amount of money at which Lopez left the office and went some place else on the premises?

A. As I stated, he left the office before any mention of money came up.

Q. That is, when he left the office, you now want to leave it that there was no talk of money or production of money?

A. He left the office a few minutes after we arrived in the office. He went outside and came back in a few minutes.

[fol. 182] Q. And at that time there had not been any talk of money or the production of money?

A. No money was—Three—two—no money was stated.

Q. Any amount?

A. No.

* * * * * * *

Proceedings in Court of Appeals

On June 7, 1962, this cause came on to be heard and was fully heard by the Court, Honorable Peter Woodbury, Chief Judge, and Honorable John P. Hartigan and Honorable Bailey Aldrich, Circuit Judges, sitting.

[fol. 183]

In United States Court of Appeals
For the First Circuit

No. 5981

German S. Lopez, Defendant-Appellant,

v.

United States of America, Appellee.

Appeal From the United States District Court
for the District of Massachusetts

Before Woodbury, Chief Judge, and Hartigan and Aldrich, Circuit Judges.

Edward J. Davis, for appellant.

William C. Madden, Assistant U. S. Attorney, with whom W. Arthur Garrity, Jr., United States Attorney, and John J. Curtin, Jr., Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT—June 15, 1962

Per Curiam. Judgment will be entered affirming the judgment of the District Court.

[fol. 184]

IN UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUDGMENT—Entered June 15, 1962

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Roger A. Stinchfield, Clerk.

Approved:

Peter Woodbury, Ch. J.

Thereafter, on June 19, 1962, mandate was stayed.

[fol. 185] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 186]

SUPREME COURT OF THE UNITED STATES

No. 236, October Term, 1962

GERMAN S. LOPEZ, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 15, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
JUL 7 196
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

EDWARD J. DAVIS
11 Pemberton Square
Boston, Massachusetts.
Attorney for Petitioner.

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules of Court Involved	3
Statement of Case	4
Reasons for Granting the Writ:	16
I. It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon	16
II. Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant	24
III. It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent with the petitioner, which the agent surreptitiously obtained while in the petitioner's office, and to admit the testimony of the agent of the conversation where objection was duly made on said constitutional	

Page

grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment 27

Conclusion 36

Appendix,—Opinion of Court of Appeals 37

Table of Citations

Cases

Accardi v. *United States*, 257 F.2d 168 22

Boyd v. *United States*, 116 U.S. 616, 626-630 33

Butts v. *United States*, 8 Cir., 1921, 273 Fed. 35, 38, 18 A.L.R. 143 17

Entick v. *Carrington*, 19 Howell's State Trials 1029, 1066 33

Goldman v. *United States*, 316 U.S. 129 ..... 30, 31, 34

Hester v. *United States*, 265 U.S. 57 33

Jones v. *United States*, 362 U.S. 257, 266 33

Kinard v. *United States*, 96 F.2d 522, 523 24

Kreiner v. *United States*, 11 F.2d 722, 731 24

McDonald v. *United States*, 335 U.S. 451, 454 33

Miller v. *United States*, 120 F.2d 968 24

Olmstead v. *United States*, 277 U.S. 438 ..... 30, 32

On Lee v. *United States*, 343 U.S. 747 .. 30, 31, 32, 33, 34

Sherman v. *United States*, 356 U.S. 369 18

Silverman v. *United States*, 365 U.S. 505 .. 29, 30, 31, 34

Sorrells v. *United States*, 287 U.S. 435 ..... 17, 18

Todisco v. *United States*, 298 F.2d 208, cert. den. 268 U.S. 984 ..... 34, 35

United States v. *Jeffers*, 342 U.S. 48, 51 33

United States v. *Kabot*, 295 F.2d 848, cert. den. 369 U.S. 803 ..... 34, 35

United States v. *Klosterman*, 248 F.2d 191, 192, 3rd. Cir., 1957 ..... 18, 19, 21

United States v. *Landry*, 257 F.2d 425 26

Page

Miscellaneous

Constitution of the United States,
Fourth Amendment 3, 6, 27, 31, 32, 33, 34, 35
Internal Revenue Code of 1954, Section 4231 3
Section 4232(b) 4
Rule 52(b), Federal Rules of Criminal Procedure 3
18 U.S.C. Sec. 201 4
28 U.S.C. Sec. 1254(1) 2

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No.

GERMAN S. LOPEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, German S. Lopez, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit, entered on June 15, 1962.

Opinion of the Court Below.

The United States Court of Appeals for the First District, on June 15, 1962, without opinion, ordered, adjudged and decreed that "the judgment of the District Court, is affirmed."

Jurisdiction

The judgment of the Court below entered on June 15, 1962, is contained in the certified copy of Record of Proceedings in Court of Appeals below, filed with this petition. Jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon.*

II. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent which the agent surreptitiously obtained while in the office, and to admit the testimony of the agent of the conversation, where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

Constitutional Provisions, Statutes and Rules of Court Involved

1. *The Fourth Amendment provides* —

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. Rule 52(b) *Federal Rules of Criminal Procedure* reads:

> "*Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

3. Section 4231 of the Internal Revenue Code of 1954, 26 U.S.C. 4231, provides that:

> "There is hereby imposed:
>
> (6) Cabarets. — A tax equivalent to 10 percent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, "cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments; except that if the person receiving such payments is a concessionaire, the tax imposed under this paragraph shall be paid by such concessionaire and

collected from him by the proprietor of the roof garden cabaret, or other similar place. No tax shall be applicable under paragraph (1) or (2) on account of an amount paid with respect to which tax is imposed under this paragraph . . ."

Section 4232(b) of said Act provides:

"(b) Roof Garden, Cabaret or Other Similar Place. —The term "roof garden, cabaret, or other similar place," as used in this chapter, shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges, or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

Statement of Case

The petitioner, German S. Lopez, on October 24, 1961, had been conducting a restaurant and liquor business under a lease arrangement since March 1959 at Clauson's Inn, Falmouth, Massachusetts. (R. 102)[1].

The petitioner was indicted on four counts on bribery charges, in violation of Title 18, U.S.C. section 201.

Count 1 alleged that the defendant on October 21, 1961 bribed Roger S. Davis, a Revenue Agent in the United States Internal Revenue Service by giving him $420 with intent to induce said Davis to omit to do an act in violation of his lawful duty, to wit:

"to refrain from making an examination of the books and records relating to sales and receipts of the bar

[1] "R" refers to Record Appendix to Brief of Defendant-Appellant in Circuit Court below.

and lounge at Clauson's Inn, for the years 1959, 1960 and the first two quarters of the year 1961, from computing tax on said sales and receipts, and from reporting same to the Internal Revenue Service."

Counts 2, 3 and 4 charged that petitioner on October 24, 1962, did give as bribes to said Agent Davis respectively, in Count 2, $200.00, in Count 3 a promise of $200.00, in Count 4, a thing of value, to wit: an expense-paid weekend accomodation for said Roger S. Davis, his wife and family, at the Honeymoon Cottage, Clauson's Inn, North Falmouth, Massachusetts—with intent to influence him to aid in committing fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter. (R. 2-5).

The government's case at the trial with respect to the matter of cabaret tax attaching to the defendant's business operation proceeded on the basis that dancing or singing in connection with the orchestra or juke box playing in the bar and lounge area of Clauson's Inn would create a cabaret tax on sales in this area during such entertainment. (R. 9-12).

On January 31, 1962, the jury returned a verdict of Not Guilty on Count 1 and a verdict of Guilty on Counts 2, 3 and 4. (R. 1).

On February 6, 1962, the petitioner filed a Motion for Judgment for the defendant on Counts 2, 3 and 4 of the indictment, notwithstanding the jury's verdict. (R. 1).

The petitioner relies on Federal Rules of Criminal Procedure, Rule 52(b), on Questions I and II, supra, for right of review thereof.

At the trial, the Court admitted a wire recording of a

conversation of the petitioner with a government agent at the private office of the petitioner on October 24, 1961, and the testimony of the agent of the conversation, which were objected to as in violation of the Fourth Amendment. (R. 71-74). Later at the trial the petitioner raised the question of illegal entrapment at the time of argument, and the issue of entrapment was made a part of the Trial Court's charge. (R. 133, 134). It is submitted that if the evidence ought to have been excluded when presented, the defendant's rights thereto ought not to be precluded by the status later arising under the defense of illegal entrapment.

The following facts are uncontrovertible on the record.

1. Agent Davis testified that on August 31, 1961 he visited and observed the defendant's operation at Clauson's Inn, Falmouth, Massachusetts as a routine visit (R. 10, 33), twice the same day, and that prior thereto he had no knowledge of the operation. On the second visit, in the evening of the same day he testified he saw dancing in the lounge in connection with the entertainment, that he did not see the defendant and left the premises.[2] (R. 10)

2. Agent Davis testified that between August 31, 1961 and October 21, 1961 he did not have the defendant's business at Clauson's Inn under surveillance, and that during this time he did not visit the premises, and did not receive or make any report as to the defendant's business at the Inn; that he had no knowledge of what took place in the operation before October 21, 1961, excepting his alleged observance on the evening of August 31, 1961. He further testified that he came on his visit to the Inn on October 21,

---

[2] In this connection, if there was dancing, there was no evidence that the defendant knew of it.

The defendant testified that on the evening of August 31, 1961 in the course of his work he was in and out of the bar and lounge at the Inn while Agent Davis was there. That he observed him there and saw no dancing in the area. That there was a sign displayed of "No Dancing" (which was introduced in evidence).

1961 alone, without prearrangement, as a routine visit to ascertain its activity with reference to cabaret tax liability (R. 32, 33).

3. The record is barren of any activity in the defendant's business operation at Clauson's Inn which would create a cabaret tax liability at any time prior to October 16, 1961.[3]

4. The testimony of Agent Davis was that at the meeting of the defendant with him on October 21, 1961, at Clauson's Inn, the defendant offered him a bribe to avoid the aggravation of an examination for cabaret tax liability for the period prior to the then tax quarter ending October 31, 1961, on the stated situation that the defendant had never filed a cabaret tax return applicable to the business. He further testified in this connection "that he (the defendant) didn't wish to be bothered filing any past tax returns for any past period going back to the time he was in business or started in business." (R. 14) Agent Davis evidence with respect to examination of the books of the

---

[3] Agent Davis testified in cross-examination:

(The following question is read:

[56] "Q. What was the basis of your stating to Mr. Lopez on the night of October 21, 1961 that there would be a cabaret tax prior to October 17, 1961 in the figure that you now say you mentioned?

A. Sir, October 17th didn't enter into this."

"XQ. May I substitute the date of October 21, 1961 in the previous question? And would you give me an answer.

A. The figures discussed on October 21st related to a year, a year's figure.")

A. The basis of that, sir, was that I believe, the conversation that night, he stated that he had this Trio and a piano player for a period of time. Since this was October 21, I assumed it was for the period previous to October 21st. The basis of the calculation was that, the figure he gave me for $160,000 gross sales—the figure of $60,000 total sales for the bar and lounge, and his estimate of one-half of that, or $30,000 sales at night, and an estimate of tax would be $3,000." (R. 41)

He further testified in that connection "I did not tell him that he owed any money." (R. 43)

XQ. What right did you have to tell this man that he owed money for a year without an examination of books, and without

business, at this meeting, was that he would examine the same later when convenient. (R. 36-38)

His evidence was that he would return the following Tuesday in connection with the preparing of a 720 Form applicable to the quarter period ending October 31, 1961. (R. 47, 51) It was manifest at the meeting that the books did not carry cabaret tax data prior to October 16, 1961 and that the existence of cabaret tax liability related to the entertainment described which was collateral to the books. (R. 168). Davis testified that he was an accountant (R. 41).

5. Agent Davis testified that the events of the meeting on October 21, 1961 at the Inn, relating to the alleged bribe, took place in the defendant's office. That the defendant and Davis were alone at all times and there was no corroborating witness. (R. 33)

Davis testified that at this meeting $200. was placed on the desk in the office by the defendant and offered to

---

any basis in fact that there was entertainment, including dancing, for the year 1961?

A. I did not tell him that he owed any money.

Agent Davis testified on cross-examination:

"Q. Is that your position now, that you did not tell him that night that you were just using figures at random, without having any purpose?

A. I did not tell him he owed any money to the government for the year 1961.

Q. Did you tell him he owed any money that night for the year 1960?

A. I told him—? No, sir.

Q. Did you tell him that night he owed any money for 1959?

A. No, sir.

Q. Was there a basis then for a cabaret tax prior to August 31, 1961?

A. I don't know, sir." (R. 43, 44)

There is in evidence Defendant's Exhibit B showing the ledger entry made on October 16, 1961, which reads. "Oct. 16, 1961 Change in policy of entertainment. From this date Liquor Sales subject to cabaret tax during entertainment hours. This tax is to be deducted from beverage sales which are subject to a rent charge." (R. 120)

Davis by the defendant with the request "to drop the case"; that this was repeated and that Davis refused each offer with the statement that he had a job to do, "to examine the books"; that later at the meeting the defendant "added some bills to it", which then made the amount $420., which was offered and refused. That the defendant got angry and insisted. Then, Davis stated, "I told him I asked him how much money was on the desk, and he said $420". About that time I picked the money up. It was about 10 o'clock. I put it in my pocket and left the office. (R. 15) [4]

Emanuel Shuster, Regional Director of the United States Internal Revenue Inspection Service, testified that the regulations of the Internal Revenue Service was that if a bribe was offered, or if there were facts indicating that a bribe might be offered the agent was to divert the subject, terminate the meeting and leave. (R. 101)

6. Agent Davis further testified on cross-examination as follows:

> "Q. I refer to the transcript, page 29, lines 21 to the end,
>
> > 'Q. Now coming back to the night of October 21, 1961 when you visited the premises there, in your conversation on the occasion did you agree on some basis with Mr. Lopez to fill out Form 720, the cabaret tax, in connection with Mr. Lopez' business at Clauson's Inn in Falmouth?
> >
> > A. I did not agree to fill out forms.
> >
> > The Court: The way you gave the answer, it would not appear on the record, because you gave

[4] The defendant's testimony was that he had given the agent $420 to do what was required on his own time, not the government's, for cabaret tax returns on the business (R. 111, 112).

it with an infonation. Will you please explain what you mean?

Q. Will you follow his Honor's suggestion?

The Court: Read the question and the answer please, Mr. Duffy.

(Question and answer were read.)

The Witness: Your Honor, I didn't agree to fill out the form. That is not my job. *What I agreed to was to return to the premises so that he could file a return, if due.* (Italics supplied).

Q. When you made that answer was the answer true?

A. Yes, sir.

Q. Is it true now?

A. Yes, sir." (R. 51)

7. The Revenue Inspection Service organized a plan to entrap the defendant by arranging for Davis to go to Clauson's Inn on October 24, 1961 and meet with the defendant at the defendant's private office. (R. 16, 17)

Richard A. Callahan of the said Service testified that on October 24, 1961 he placed a minifon recording on the person of Agent Davis, which was concealed, and also a Schmidt battery operated radio transmitter, with instructions to Agent Davis as to what he should do, when he went to Clauson's Inn in Falmouth (R. 66, 67) The evidence was that the Schmidt did not work. (R. 67)

Callahan testified:

"Q. State what those instructions were.

A. I instructed Agent Davis to try to steer the conversation back to the meeting of October 21 when he allegedly received $420, and I gave him certain instructions as to how to lead into that.

I told him that he should explain, go into a mathematical explanation as to what he thought was due tax-wise, and I also gave him technical instructions in that he should steer Mr. Lopez to a quiet place, possibly his office, not to rustle papers and to sit as close to Mr. Lopez as possible in the course of the conversation." (R. 67)

The witness Callahan described the Minifon recording device and as to how it was attached to the person of Agent Davis, and its operation. (R. 67)

Witness Callahan further testified."

"Q. As part of your instructions, did you say to him, 'Get the conversation back to the 21st. Get a general discussion as to what had occurred on the 21st.'

A. Yes, sir, I did.

Q. Did I understand you also to say, 'Give him some figures, tell him what you think is owed.'

A. Yes, sir. His opinion.

Q. His opinion?

A. Yes, sir.

Q. Now at that time did you have any facts, as far as you were concerned, as to whether anything was owed at all, any basis in fact whatsoever?

A. No, sir." (R. 94, 95)

8. Agent Davis testified that in concert with Agents from United States Revenue Inspection Service he came to Clauson's Inn on October 24, 1961, that one of the Agents entered the Inn, but not in his company, and other agents waited outside of the Inn. The agents who waited

outside had instruments to be operated so as to record sound communications from the Schmidt, if it worked.

Davis entered the private office of the defendant upon his request to the defendant pursuant to instructions.

The Minifon recording of what occurred in the office was introduced and played to the jury over the objection of the defendant, and marked as Government's Exhibit 6 (R. 75)

The defendant contends that the Minifon recording (Exhibit 6) establishes the following facts.

(1) Pursuant to plan Agent Davis by his request obtained entrance to the private office of the defendant on October 24, 1961.

(2) Agent Davis introduced "this 720 excise form we were talking about", and the defendant immediately exhibited his mind by a verbal act: "I—never did file cabaret tax. I never thought there was need of it." This exhibited the mind of an innocent man with respect to the subject of cabaret taxes of the business, and his relation to the occurrences of the meeting of October 21, 1961.

(3) Nevertheless the agent pursued the plan of entrapment. The following then occurred.

> "Davis: I had to do a little thinking about it. I want to give you a couple of figures now. I mean it took me a while." (R. 81)

A colloquy ensued on the subject of confidences between the defendant and Agent Davis, and the Agent pursued the matter of figures as follows:

> "Davis: O.K. I am going to put down some figures here. Your gross was about, gross sales about 160,000.
>
> Lopez: About 160,000.
>
> Davis: Now 40% of that is—

Lopez: I should say about 30, about 35, conservatively.

Davis: Well, we'll say about $50,000 is bar sales.

Lopez: Ya.

Davis: Now—maybe roughly half of that is at night.

Lopez: Well, I should say about half of that should be at night.

But I should say perhaps, you see, my dining room is a big seller and the bar, and my dining room sells and the the bar.

Davis: Ya, I understand that.

Lopez: This is the greatest. You see a very busy night at the bar, the bar itself may sell $150, $175, a good steady night in the lounge itself.

Davis: Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year." (R. 84)

The defendant contends that the statement of Agent Davis, "Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year" was completely false without any basis in fact.

The colloquy continues:

"Davis: No I'd say $20,000, conservatively 25 would be cabaret sales because—

Lopez: No.

Davis: Well, . . . the band and everything.

Lopez: *Most of the business . . . at night when people actually get up and dance I have not been allowed to stop it. Which would be Friday and Saturday nights. The other nights we don't have anything anyway. The other nights is a minor thing that I can always control, but Fridays and Saturday nights in*

the summer months, when I'm very very busy, I often neglect to get up there and do it." (Italics supplied)

At this point on the basis of the defendant's statement there was no intentionally allowable dancing and thus no cabaret tax, in the absence of special facts. This was clearly the mind of the defendant as expressed at the ouset of the meeting.

There then ensued the following with reference to the acts of Agent Davis indicating to the defendant that he was not using the quoted figures

"Davis: Well, I'm not . . .
Lopez: That's right.
Davis: I'm not using this." (R. 84, 85)

This statement of the Agent was an obvious fraud. The only time dancing occurred on the evidence was as stated by the defendant; and if that were excluded from consideration there would be no basis whatsoever to claim a tax. This fraud continues "You know just between you and I, I would say about $20,000 in taxable sales. You say your business isn't that much. Now, look, you went into business in 1959. In 1959 the tax was 20%." (R. 84)

The colloquy continues: (R. 84)

"Lopez: I only operated about six months under the 20%.
Davis: Well, that was 1959 and half of 1960.
Lopez: Ya.
Davis: Between 1959, out of the $20,000 could be maybe—
Lopez: Make it 5,000 . . .
Davis: Well, I'm trying to figure. You were open from March on. The big trade is in the summer.
Lopez: Ya.

Davis: Maybe 15,000. At 20% that would be $3,000.00 for 1959. In 1960, 5 months at 20%; the rest of this is 10%, do you remember that?

Lopez: Ya. . . .

Davis: Well, . . . about 20. And 8 of this was under the 20%; 8,000 and 12 was under the 10%. So, $8,000.00 at 20% would be 4,000. 12,000 at 10% would be 1,200. In 1961, well for half the year . . . 16,000; cabaret $3,000.00. No—

Lopez: You're very high Actually, I mean, you're very high.

Davis: Let's see what we have here anyway. (Counting) 2, 2, 4, 8, $11,200. Well, let's say . . . just for argument purposes — Between 9 and 10,000 dollars; that we know is — You havn't kept any records, you see. Now, I mean, I don't know what . . . exactly what your records show. How are your books? Do your books show any balance sheets?

Lopez: It shows just the

Davis: Well let's go back to the $10,000.00. The penalty for not filing any returns is 25%. $12,500 back taxes, conservatively, . . . plus 6% interest, which will go on to here will I'd say run over $13,000.00 *Now I don't want to get greedy or anything, but, well, what would you be gaining* . . . (R. 85) (Italics supplied)

Lopez: I have got a couple of hundred odd dollars for you right now. Listen—

Davis: Ya, but I mean, well—

Lopez: I have . . . money right now.

Davis: I know but—

Lopez: I'll tell you I'd like to pay as we go along and I'd like you to take me into your confidence. As we go along a couple of hundred every time you drop in. I'd like to keep it that way.

Davis: Well,

Lopez: Don't drop in too often.
Davis: How much is here?
Lopez: Two hundred, keep it." (R. 86)

The foregoing statements of Agent Davis were grotesquely fraudulent without any basis in fact. His statements became so reckless that he was stating, "So, 8,000 at 20% would be $4,000." and ended up with a mythical penalty.

The statement following the penalty, "now I don't want to get greedy or anything but, well, what would you be gaining"—is the request for the bribe.

The defendant contends that Agent Davis fabricated a false and fictitious claim in the mind of the defendant that a United States cabaret tax was due on his business, without any basis in fact and grossly inordinate with respect to the circumstances of the defendant, and that the Agent induced, provoked and in effect requested the defendant to bribe him to avoid the so-called claim; that the facts were further aggravated by the perilous position of the Agent Davis, who had received $420. from the defendant on October 21, 1961, allegedly as a bribe in connection with such a tax, in the situation where the Agent was alone with the defendant and without a corroborating witness and in any event in violation of regulations in his Department.

Reasons for Granting the Writ

1. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law and the petitioner was entitled to a verdict of acquittal thereon.*

Appellant contends that the uncontradicted facts in this case establish that he was entrapped as a matter of law and that he was entitled to a verdict of not guilty.

1. The much-cited case of *Sorrells* v. *United States*, 287 U.S. 435 is the foundation for the applicable law. Under this case entrapment is raised by the plea of not guilty.

The governing principles are stated in *Sorrells* at pages 441, 442:

> "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design * * *. A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

The Court went on to cite *Butts* v. *United States*, 8 Cir., 1921, 273 F. 35, 38, 18 A.L.R. 143, to the effect that it is unconscionable and contrary to public policy to punish a man for a crime he evidently would never have committed were he not inspired, incited, and persuaded by officials of the law. The Court decided that under such circumstances no crime was committed, for Congress could not have intended that an act within the literal meaning of a criminal statute would be a crime if incited by those whose purpose it is to prevent crime. Traps and decoys are sometimes permitted. "The predisposition and criminal designs of the defendant are relevant." 287 U.S. at page 451, 53 S.Ct. at page 216.

Sherman v. *United States*, 356 U.S. 369, held that the undisputed testimony established entrapment as a matter of law. On the record, a narcotics user under treatment for the addiction, as to whom there was no evidence that he was then in the trade was induced to make three sales of narcotics by a government agent. Except for a record of two convictions nine and five years previously, there was no evidence that petitioner himself was in the trade or that he showed a "ready complaisance" to the informer's request.

The court adhered to the majority opinion in *Sorrells* v. *United States*, *supra*, and declined to reassess the doctrine of entrapment according to the principles announced in the minority opinion which concurred in the result.

Sherman v. *United States*, *supra*, affirms, as did the *Sorrells* case, that entrapment occurs only when the criminal conduct "was the product of the creative activity of law-enforcement officials". It held further, "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent, and the trap for the unwary criminal."

The Court further said, "The principles by which the courts are to make this determination were outlined in *Sorrells*. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

2. The appeal to the Circuit Court below involved the defence of entrapment and presented to the Court the issue of whether the criminal intent proceeded from government agents or whether these agents simply afforded opportunities to one already disposed to the alleged criminality. *United States of America* v. *Klosterman*, 248 F.2d 191, 192, Third Circuit, 1957.

Klosterman decided that the test to be applied under the principles governing illegal entrapment is, was the defendant a man otherwise innocent who would not have committed the crime but for official solicitation, or *was he predisposed to pursue a criminal design which he had already conceived?* (Italics supplied.)

On the facts of that case, Deeney, an Internal Revenue Agent approached a fellow agent, King, with respect to a tax-payer's return then under investigation for an unusual time, with the statement that a friend of his who was an associate of the taxpayer, reported that the taxpayer would pay ten to twenty thousand dollars to settle the case. On the record, Deeney abandoned the original plan, and later was relentlessly pursued by the fellow agent under orders of their superiors to carry out the plan to bribe until the defendant yielded and agreed to arrange for a meeting of the other agent with taxpayer's associate. The Court applied the above-said test as to Deeney and held on the record, he was entrapped to commit bribery.

The Court stated: "The inordinate amount of persuasion of Deeney by King indicates two elements in this case. It clearly discloses that Deeney was sincere in his attempt to abandon his original plan. It shows also that the criminal design and intent for the commission of the actual bribery originated not with him but rather with the government agents who engineered the persuasion and solicitation."

In the instant case it is impossible logically to sustain on the evidence that the defendant on any basis whatsoever was pursuing a criminal design "which he had already conceived", with relation to the events of October 24, 1942 at the meeting of Agent Davis and the defendant at Clauson's Inn. The meeting was organized and carried out by the government agents to entrap the defendant. (Statement, Par. 7, spura) The genesis of the meet-

ing of October 24, 1961 and of the events that occurred at the meeting originated with the government agents after October 21, 1961.

On the record of this case at the trial there was no dispute that the defendant gave and agent Davis received four hundred twenty dollars on October 21, 1961. The issue was whether it was given and received as a bribe, and the jury decided that it was not a bribe under the charge.

The evidence introduced by the government as to the events occurring at the meeting of the defendant and the government agent Davis on October 21, 1961 was pertinent to establish a bribe on October 21, 1961. It necessarily related to a criminal disposition to commit bribery on October 21, 1961, if the evidence were true. It could not by its very nature sustain that he was disposed to pursue a criminal design to commit bribery on October 24, 1961 "which he had already conceived", since it is manifest that it was impossible for him to have had anything in his mind on an enterprise as to which he had no knowledge whatsoever before the event.

Further, the record is positive as to the agreement of agent Davis made on October 21, 1961 with the defendant, on the testimony of agent Davis, in response to the trial court's inquiry. "What I agreed to was to return to the premises so that he (the defendant) could file a return *if due*". (Emphasis supplied.) (Testimony of agent Davis, statement, supra, par. 6.)

At the meeting of October 24, 1961 (the facts of which are established on the minafon recording, (Statement supra, par. 8.) the criminal design as to the offenses charged in counts 2, 3 and 4 manifestly originated with the government agent Davis with the express purpose of inducing the defendant to commit the crime in order to prosecute him, and the government agent Davis induced,

provoked and solicited the defendant to commit the offenses.

This position is clearly shown on the recording. (See Statement supra, par. 8.)

(1) At the outset of the meeting of October 24, 1961, as shown on the recording, the defendant disclosed an innocent mind: "I—never did file cabaret tax. I never thought there was need of it". (Statement, supra, Par. 8. #2.) This verbal act frustrated immediately the avowed plan of the agents to relate the conversation back to the meeting of October 21, 1961. (Statement, supra, Par. 7.)

(2) Nevertheless agent Davis pursued the plan of entrapment by false statements of the existence of excise tax obligations which culminated in the agent's solicitation of the bribe: "Now I don't want to get greedy or anything, but, well, but what would you be gaining"—the request for the bribe. (Statement, supra, Par. 8.)

United States v. *Klosterman*, (Supra at pp 195-196), in its opinion with respect to the co-defendant Stafford, demonstrates the principles under the law of entrapment, whereunder the defendant here would be entitled as a matter of law to the status, on the record, of an innocent man at the outset of the meeting of October 24, 1961, and to the rule there stated "We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man".

4. *Accardi* v. *United States* held 257 F.2d 168 that

> "In rebutting the defense of entrapment, primary emphasis is on the defendant's predisposition to commit the crime, but a court must also carefully weigh the conduct of the government agents, which must not fall below reasonable standards of the proper use of government power in law enforcement."

At page 172, the Court said:

> ". . . The majority opinion in Sherman reaffirms the emphasis on the defendant's intention or readiness to commit the crime, as basic in rebutting entrapment; but the Court by no means downgrades the duty of scrutinizing closely the conduct of the government agents.[5]

Footnote 5. read in part:

> "In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the minority to the *conduct of the government agents.* There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods. 'The function of law enforcement is the prevention * * * not * * * the manufacturing of crime.'

It is submitted that when Agent Davis left Clauson's Inn on Saturday night, October 21, 1961 with $420 in his pocket which he received from the defendant, he was in a predicament. Obviously, he was in violation of regulations

of his Department in any event. He had been attached to the Internal Revenue Service for two years and was an accountant. A policeman investigating a matter as routine would consider it unthinkable, to take a bribe without a corroborating witness, and then attempt to explain it to a superior. On the facts in this case he testified that he first talked with a fellow agent after leaving the Inn on the night of October 21, 1961, and then later his group chief at the instance of the fellow agent talked with Agent Davis.

There was implicit in the concerted plan of the revenue inspection service agents for entrapping the defendant in his private office the relief of the perilous status of Agent Davis. The avowed plan according to the revenue inspection service agents was to relate back by statements, cabaret tax involvement and alleged bribery, relating to the meeting of October 21, 1961. This immediately failed on the statement of the defendant at the outset of the meeting of October 24, 1961 that he never filed a cabaret tax since he thought he never needed to. In this status the procedure adopted by Agent Davis in fabricating in the mind of the defendant, as if true, a false and fictitious claim of a government cabaret tax, with outrageously exorbitant figures, ending with a thrust for a bribe in the words "I don't want to be greedy" is highly reprehensible. There is inherent in it the aspect of gestapo or inquisition in attacking the human mind by lies and to involve the person attacked in crime. It is submitted that this cannot be countenanced, as a matter of law; certainly in conjunction with the other established facts.

11. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

It is submitted that this question presents a matter open to review under Federal Rules of Criminal Procedure 52(b) as plain error affecting substantial rights, viewed with respect to principles giving the right of review of a Judge's Charge undertaken without request, which manifestly misleads the jury by the instructions given on an essential issue, as decided in *Miller* v. *United States*, 120 Fed. 2nd, 968.

In the *Miller* case the Court stated the following:

> "In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not. *Kinard* v. *United States*, 68 App. DC 250, 96 Fed. 2nd. 522, 523; *Kreiner* v. *United States*, 2 Cir. 11 Fed. 2nd, 722, 731. Some courts have held that failure to instruct on the consideration to be accorded to character testimony in the absence of a request for such an instruction is not reversible error. *Kinard* v. *United States*, supra. It may be conceded that the court was not bound to instruct on character testimony in the absence of a request for such an instruction, but when it did proceed to instruct the jury thereon, it was required to give a correct instruction. It could not mislead the jury by an instruction which was erroneous. Misleading the jury in regard to the purpose for which they should consider character evi-

dence adversely affected the substantial rights of the defendants."

At the trial in the instant case the Court charged the jury on the question of entrapment as follows:

"Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.

Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account of dancing, if there were, Agent Davis obviously, in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.

Now the law with respect to entrapment is this: if a government agent by improper means or over-bearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means."

It is to be noted that there was no issue as to how an ordinary person would have reacted or done in the position of the defendant. The issue was whether the defendant was entrapped, not whether an ordinary person would have been.

United States v. *Landry*, 257 Fed. 2d 425.

Further the burden of proof must be allocated. The burden is upon the defendant to produce evidence that government agents induced him to commit the crime, and when evidence has been brought out by the defendant the government must prove beyond a reasonable doubt that inducement was not the cause or creator of the crime.

United States v. *Landry*, *supra*, at 428, 429.

Though the established facts on the record require a finding, as a matter of law, that illegal entrapment occurred, it is submitted that in any event the Court's charge was erroneous and misleading on the law of entrapment, and prejudicial to the Defendant.

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent with the petitioner, which the agent surreptitiously obtained while in the petitioner's office, and to admit the testimony of the agent of the conversation where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

After hearing, with evidence taken, of the Defendant's Motion and Petition to Suppress Evidence (R. 138, 138, 164, 165) the Court denied the Motion to Suppress the minafon recording, and the defendant's objection was renewed at the trial (R. 71 and 72) on the grounds that its admission and the admission of the testimony of Agent Davis of the recorded conversation was in violation of the Fourth Amendment. The grounds of the defendant's objection and the facts established relating thereto were as follows:

1. That the private office of the defendant at Clauson's Inn was a constitutionally protected area.
2. "That the government agent Davis on October 24, 1961 solicited and obtained permission to enter into the defendant's private office, where the de-

fendant conducted his business affairs in private ...." (Defendant's position, R. 137).

Agent Davis testified: That on October 24, 1961 he stated to the defendant that he desired to go with the defendant into his private office, and went there pursuant to said request (R. 140).

3. That Agent Davis "obtained this permission by misrepresentation of the status of his entry" (position of defendant R. 137), and "that on October 21, 1961—that the said agent had come to the said premises and had agreed with the defendant to return at a later date, namely, either Monday or Tuesday, which would be October 23 or October 24, 1961 on his own time to prepare 720 Forms for cabaret taxes actually due the government by the defendant—" (position of defendant R. 138). "That the acts and circumstances by which the agent gained entry into the private office on October 24, 1961 as it related to the arrangement agreed upon for his coming, were in effect a misrepresentation" (position of defendant R. 138).

These positions taken by the defendant were established as fact on the evidence.

(a) Agent Davis unequivocally stated in his testimony upon inquiry by the Court calling for precise statement: "What I agreed to was to return to the premises so that he (the defendant) could file a return, if due." (Statement supra #5, Record 51.)

(b) Reference is further made to the Statement, supra, #7 and #8, with record citations establishing that Agent Davis entered the Defendant's private office on October 24, 1961 pursuant to the planned operation of government agents for entrapment of the petitioner. It is submitted that the foregoing

acts and circumstances set out in the Statement established entry by the agent into the private office by misrepresentation.

At the conclusion of the hearing on the Motion to Suppress the Trial Court stated the issue and the basis of his denial of the Motion as follows:

"The Court: Well, it is perfectly clear that your theory is that the individul was admitted under a deceptive statement and, therefore, everything that was taken within the inner office was taken as a result of admission by deception.

Mr. Davis: That is right, sir.

The Court: So it applies to notes on a piece of paper as well as notations upon a wire recorder.

Mr. Davis: Well, if the paper—there might be a different state of facts on a piece of paper. If it was open and obvious that that was being done, that would be one thing, and I think probably distinguishable from an electronic device, which is secret.

The Court: Well, I understand the argument you make. It seems to me a distinction without a difference. The petition and motion are denied."

The Trial Court reiterated its position on this matter in its Charge to the Jury (R. 136).

It is submitted that the Court's statement that the obtaining of the minafon, Government Exhibit 6, was no different than if the agent took private notes after entrance into the private office (R. 136, 164, 165), is not sound. The minafon is no different than if another agent were in the office by stealth with the powers of a minafon.

However, the real ground of objection is that in light of the *Silverman* case, all evidence of the conversation of the

agent and the defendant of the meeting of October 24, 1961 in the private office, whether in the form of testimony of the agent or as recorded in the minafon, ought to be excluded as illegally obtained, in violation of the Fourth Amendment since the entrance to the office was gained by misrepresentation. Defendant's counsel in renewing his objection to the admission of this evidence at the trial stated this as his position. (R. 71)

That the minafon recording and the testimony of Agent Davis of what occurred at the meeting at Clauson's Inn on October 24, 1961 constituted the government's case on Counts 2, 3 and 4 cannot be disputed. If the said recorded conversation and the testimony thereof of Agent Davis were excluded, the government's case on Counts 2, 3, and 4 would fail for lack of proof.

Whether the securing and taking out the evidence from the private office of the Defendant should be accomplished by minafon on the person of Agent Davis, or transmission by Schmidt from his person, or by his personal faculties as such, each would be illegally obtained if entrance was gained by misrepresentation. In this respect a private office is on the same basis as a home. In effect it is a physical invasion of a constitutionally protected place as in *Silverman* v. *United States*, 365 U.S. 505, which distinguished and declined to reconsider the earlier cases of *Olmstead* v. *United States*, 277 U.S. 438, *Goldman* v. *United States*, 316 U.S. 129, *On Lee* v. *United States*, 343 U.S. 747.

In the *Silverman* case at the trial in the Federal District Court in which petitioners were convicted of gambling offenses under the District of Columbia Code, there was admitted in evidence over their objection testimony of police officers describing incriminating conversations engaged in by petitioners at their alleged gambling establishment, which the officers had overheard by means of an electronic listening device pushed through the party wall

of an adjoining house until it touched heating ducts in the house occupied by the petitioners. The Supreme Court held that such testimony should not have been admitted in evidence and the convictions must be set aside as in violation of the Fourth Amendment. It was held that on the record of the case, the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment. *Goldman* v. *United States*, 316 U.S. 129, and *On Lee* v. *United States*, 343 U.S. 747, distinguished.

In the *On Lee* case the agent, not an officer or employee of the United States Government, was a "stool pigeon" who used an electronic device at quarters in a Chinese laundry open to the public, to tap the conversation to a United States agent outside the premises.

In *Goldman* v. *United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L.Ed. 1322, it was held that the action of federal agents in placing a detectaphone on the outer wall of the defendant's hotel room and thereby overhearing conversations held within the room, did not violate the Fourth Amendment. There the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work the Court expressly reserved decision as to the effect on the search and seizure question of a trespass in that situation.

In the *Silverman* case the Court said as follows:

> "But in both Goldman and On Lee the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In Goldman there had in fact been a prior physical entry into the petitioner's office

for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U.S. at 134-135. And in *On Lee*, as the Court said, '. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 U.S. at 751-752.

The absence of a physical invasion of the petitioners' premises was also a vital factor in the Court's decision in *Olmstead* v. *United States*, 277 U.S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that '(t)he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '(t)he intervening wires are not part of (the defendant's) house or office any more than are the highways along which they are stretched.' 277 U.S., at 465. Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' *house or office*—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measur-

able in terms of ancient niceties of tort or real property law. See *Jones* v. *United States*, 362 U.S. 257, 266; *On Lee* v. *United States*, supra, at 752; *Hester* v. *United States*, 265 U.S. 57; *United States* v. *Jeffers*, 342 U.S. 48, 51; *McDonald* v. *United States*, 335 U.S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-630. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in Goldman and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was 'unwilling to believe that the respective rights are to be measured in fractions of inches'. But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635. We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch."

See strong concurring opinion by Mr. Justice Douglas in *Silverman* v. *United States, supra,* showing the basic philosophy and rationale underlying the decision. Also for this purpose see the strong dissenting opinion in the case of *On Lee* v. *United States supra.*

The Defendant argues that the premise in the above cases was physical penetration, and distinctions pertaining thereto.

But here there was physical invasion into the premises by misrepresentation. This would not differ from entrance by stealth without permission.

As an added reason for granting the Writ under Question III your petitioner replies to the brief of the Government filed in the Circuit Court below which calls upon the defendant to distinguish *Todisco* v. *United States*, 298 F.2d, 208, cert. den. 368 U.S. 984 and *United States* v. *Kabot*, 295 F.2d, 848, cert. den. 369 U.S. 803. (Government's brief, page 12, last paragraph.)

In the *Todisco* case a lawyer was indicted and found guilty of offering a bribe to settle a tax case of a client. There were a number of conversations taped and transmitted to recipients outside by a device on the government agent from the office of the defendant, all relating to conversations of a proposed bribe of $500.00. It was held not a violation of the defendant's rights under the Fourth Amendment.

It seems obvious that the agent in the instant case on the facts was in the office of the defendant by misrepresentation, as distinguished from the *Todisco* case embracing invited vists by the defendant in that case relevant to the object of the bribe. Manifestly in *Todisco* the evidence supported that the defendant was pursuing a criminal design which he had already conceived, whereas in the instant case this could not be found to be so.

The entrenching of a government agent in the office of the defendant, a constitutionally protected area, by misrepresentation and for the purpose of illegal entrapment seems clearly an invasion of privacy of the defendant under the Fourth Amendment. In the *Todisco* case there was no invasion of privacy whatsoever in legal contemplation.

The Court in *Todisco* refers to an article in a law review which assimilates a device such as a minifon with that of taking notes. As stated above, the learned Court in this case adopted such a view as expressed in his dealing with the Motion to Suppress and in his Charge to the Jury. It seems apparent that where the entrance is gained by misrepresentation into a private office, it is more the Trojan horse than a note-taking matter. It is submitted it goes to the very essence of the rights under the constitutionally protected area of the Fourth Amendment.

In *United States* v. *Kabot,* supra, an accountant was indicted and found guilty of offering and giving a bribe to a government agent to settle an income tax case of a taxpayer he was representing. The agent went to the office of the defendant with a minifon attached to his person to cover a situation indicating the offering of a bribe by the accountant, recorded a conversation concerning the subject matter, with explicit instructions not to lead the defendant on. Also a device was planted in the agent's hotel room to record and transmit to agents outside, the occurrences covering the same matter. This was clearly not the obtaining of entrance by the Agent into the office by misrepresentation, and there was absent any evidence as to illegal entrapment. Again, as in *Todisco,* this is distinguishable from the instant case.

Conclusion

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

Edward J. Davis,
11 Pemberton Square
Boston, Massachusetts.
Attorney for Petitioner.

Appendix

United States Court of Appeals
For the First Circuit

No. 5981.

GERMAN S. LOPEZ,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Edward J. Davis for appellant.
William C. Madden, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *John J. Curtin, Jr.*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

June 15, 1962.

PER CURIAM. *Judgment will be entered affirming the judgment of the District Court.*

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	3
Argument	11
Conclusion	16

CITATIONS

Cases:

Battle v. *United States*, 206 F. 2d 440	12
Corbin v. *United States*, 253 F. 2d 646	11
Costner v. *United States*, 271 F. 2d 261, certiorari denied, 362 U.S. 952	11
Cratty v. *United States*, 163 F. 2d 844	11
Ege v. *United States*, 242 F. 2d 879	11
Lockhart v. *United States*, 183 F. 2d 265	12
On Lee v. *United States*, 343 U.S. 747	15
Picciurro v. *United States*, 250 F. 2d 585	11
Sherman v. *United States*, 356 U.S. 369	13, 14
Silverman v. *United States*, 365 U.S. 505	15
Sorrells v. *United States*, 287 U.S. 435	13
United States v. *DiDonna*, 276 F. 2d 956	14
United States v. *Kabot*, 295 F. 2d 848, certiorari denied, 369 U.S. 803	14
United States v. *Pagano*, 207 F. 2d 884	14

Statute and Rules:

18 U.S.C. 201	2
Rule 29, F.R. Crim. P.	11
Rule 52(b), F.R. Crim. P.	11

653758—62——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (R. 183).

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1962. The petition for a writ of certiorari was filed on July 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entrapped, as a matter of law, into offering and giving a bribe to an internal revenue agent.

2. Whether the trial court erred in its instructions on entrapment.

3. Whether an electrical recording, which corroborated the testimony of an internal revenue agent of his conversation with petitioner, was properly received in evidence.

STATUTE INVOLVED

Section 201 of Title 18 U.S.C. provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such

money or value of such thing or imprisoned not more than three years, or both.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the District of Massachusetts on counts 2, 3, and 4 of an indictment charging him with attempted bribery of an Internal Revenue agent. He was sentenced to imprisonment for a period of one year (R. 2–5, 6–7). The court of appeals affirmed.

Count 1 of the indictment (on which petitioner was acquitted) charged that on or about October 21, 1961, at North Falmouth, Massachusetts, petitioner gave $420 to Roger S. Davis, an Internal Revenue agent, with intent to induce Davis to refrain from making an examination of the records of sales and receipts of the bar and lounge at Clauson's Inn for the years 1959, 1960, and the first two quarters of 1961, for the purpose of computing the cabaret tax due on the sales and receipts. Count 2 charged that on or about October 24, 1961, petitioner gave Davis $200 with intent to influence him to aid in committing a fraud on the United States by concealing from the Internal Revenue Service the sales and receipts and any cabaret tax due for the operations of the bar and lounge for the years 1959, 1960, 1961, and thereafter. Count 3 charged that on October 24, 1961, petitioner promised Davis $200 to be paid on or about November 24, 1961, with intent to influence him to aid in committing the aforesaid fraud on the United States. Count 4 charged that on October 24, 1961, petitioner promised Davis an expense paid weekend accommodation for Davis and his family

at Clauson's Inn, with intent to influence him to aid in committing the aforesaid fraud on the United States (R. 2–5).

Prior to trial, petitioner filed a motion to suppress as evidence a recording of a conversation between petitioner and Agent Davis in petitioner's office on October 24, 1961 (R. 5–6). This motion was denied (R. 165). The evidence at the trial and on the motion to suppress may be summarized as follows:

1. During late August 1961, Internal Revenue Agent Davis was assigned by his group supervisor to the Cape Cod area for various duties, including investigation of possible evasion of excise taxes (R. 62). On August 31 he visited the bar and lounge at Clauson's Inn in North Falmouth, Massachusetts. He introduced himself to petitioner, who was the manager and operator, and inquired whether they had dancing, singing, or other forms of entertainment. Petitioner replied that they did not (R. 170). Davis showed him an advertisement in the Cape Cod Guide for August 26, reading in part, "Clauson's Inn and Country Club. Visitors to the Cape are invited to join us for luncheon, cocktails, dinner, dancing and entertainment." Petitioner replied that he was not responsible for the advertisement (R. 9–10, 171). After further conversation with petitioner, Davis left. He returned that evening and was told that petitioner was not on the premises (R. 10, 172). The following day he prepared a report to his group supervisor, stating as follows: "Subject: Cabaret surveillance, August 31, 1961. 1. Clauson's Inn, potential delinquent, North Falmouth, bar and lounge. Trio plays six nights.

Jazz concert Sundays. When trio plays there is some dancing although management claims that it does not allow such dancing. Will follow up" (R. 11; Gov. Ex. 2).

2. Davis made another visit to Clauson's Inn the evening of October 21. He saw patrons dancing to the music of a trio. A waitress sang one song. He then talked further with petitioner, who told him that the trio played Friday and Saturday nights and that there was a piano player on Tuesday, Wednesday, and Thursday nights. Petitioner said that the juke box was used when the band was having a break. Davis expressed the opinion that the Inn was liable for a cabaret tax and asked when and where he could examine the books. Petitioner stated that his books were at the Inn, but he wished to avoid any inconvenience from an examination of the records (R. 11–12).

Petitioner suggested that they go into his office, where the discussion was continued. Davis told him that if there was a tax due there would also be a penalty for failure to file. Petitioner stated that he wished to avoid "this aggravation" and asked if they could not reach some sort of agreement (R. 13). He said he did not want to insult Davis but could not Davis drop the case if he wanted to. Davis told him that he could not and that he had filed a report of his previous visit (R. 13). A little later petitioner again said that he did not want to insult Davis and that he did not know whether to take him into his confidence or not. Davis made no response. Petitioner opened the safe and laid some money at the desk where Davis was sitting. Petitioner said, "You can

drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now" (R. 13–14). Davis refused. Petitioner urged him to take it and added, "Why don't you bring your wife and family down here for a week as my guest and stay at Clauson's Inn. Relax and play golf" (R. 14). Davis again refused and made further inquiries about the business. Petitioner added some more bills and said that he did not wish to be bothered by filing any past tax returns, but that he would file a return for the current quarter. After considerable discussion, Davis took the bills, which now amounted to $420, and left about 10:00 p.m. Petitioner told Davis that he would file a return for the current quarter and that Davis should come back the following Tuesday (R. 14–15).

Davis immediately drove to another establishment in the area and placed a call to the District Director's office in Boston. Since there was no one at the office, Davis called another agent, who told him that he would contact the group supervisor and have him call Davis back. About 10:30 Davis received a call from his group supervisor and recounted the incident to him (R. 15). These telephone calls were corroborated by the other agent and by the group supervisor (R. 64–65). On the morning of Monday, October 23, Davis turned the $420 over to the regional inspector and gave him a sworn statement as to the events of October 21 (R. 16, 96; Gov. Ex. 7).

On the evening of October 23, Davis returned to Falmouth in the company of four Internal Revenue inspectors. The following morning Davis was in-

structed to return to Clauson's Inn to keep his appointment with petitioner and to pretend to play along with his scheme, particularly drawing attention to the money which had already been paid. Davis was searched and the amount of money on his person was determined. Two electronic devices were placed on his person. One was a Schmidt radio transmitter, which was intended to transmit any conversation to the inspectors, who would be waiting outside in a car. This device failed to operate. The other was a Minifon, a self-contained recording unit (R. 16–17, 67–68).

At the appointed hour Davis met petitioner at Clauson's Inn, and petitioner invited Davis to lunch. Davis declined and suggested that they talk in petitioner's office. Davis took a form 720, federal excise tax return, from his brief case, explained it to petitioner and started questioning him about his receipts, which petitioner stated totaled about $160,000 per year. Petitioner said that he had never thought it was necessary to file a return and that he wanted Davis to take him into his confidence and advise him if anything came up. Davis, after a series of computations, told petitioner that the amount due would be over $15,000. Petitioner gave Davis four fifty-dollar bills and told him that he would have some more money for him the next month. Petitioner mentioned that he had given Davis $420 on October 21 (R. 17–19). Petitioner said that he would like to get by without filing until Davis advised him that the pressure in Davis' office made filing a current return necessary. He asked Davis whether it would be a

good idea to put up a no-dancing sign "to make it look good" (R. 20). When Davis said he might bring his wife down, petitioner told him to do that and to be his guest. He said he would have another $200 for Davis the next month (R. 21).

Following this interview, Davis met with the four inspectors, who removed the two electronic devices. They also found four fifty-dollar bills on his person, in addition to the money which he was previously found to be carrying (R. 23, 69; Gov. Ex. 5). Davis then listened to a playing of the recording, which he testified at petitioner's trial was accurate (R. 24). The recording, which was played for the jury, corroborated Davis' account of the conversation in detail (R. 78–94).

4. Petitioner testified in his own behalf. He stated that the no-dancing sign had been up in the lounge for nearly three years (R. 104–105). When Davis talked with him on the occasion of his first visit, August 31, 1961, petitioner told him he had not filed a cabaret tax because he was not required to (R. 103). On October 17 the bar had switched to entertainment, which included dancing and singing (R. 102). When Davis returned on October 21, petitioner told him that he now came under the cabaret tax, since there had been a change in the Inn's operation since October 17 (R. 108, 102). He told Davis that his books were in order and he wanted Davis to prepare and file his cabaret tax whenever it came due on his own time. He took $200 out of his pocket and then added another $100 from the safe, but Davis said that was not enough, he could not jeopardize his position for

that amount. Petitioner testified that he told Davis that he was not asking him to jeopardize his position, but merely to prepare his returns and to get his books properly in order (R. 111). He then asked his cashier if she had any big money and she brought in $120 (R. 112).

Petitioner testified that on October 24 Davis went into a lot of figures and petitioner became emotionally upset because he felt that Davis was not there for the purpose for which he came on October 21 (R. 115). Otherwise, petitioner did not testify concerning the conversation of October 24 or as to the accuracy of the recording of that conversation.

Petitioner's part-time bookkeeper testified to making a journal entry on October 16, 1961, on petitioner's instructions, "Change in policy in entertainment. From this date liquor sales subject to cabaret tax during entertainment hours. The tax is to be deducted from beverage sales, which are subject to a rent charge" (R. 120; Def. Ex. D). He also testified that he had seen the no-dancing sign from time to time since petitioner had begun operating the bar and lounge (R. 118–119).

Petitioner's wife testified that when she discovered that her husband had taken $100 from the safe and $120 from the cashier, she insisted that they should make it up from their own pockets, which they did. The argument about paying Davis lasted all night and almost broke up their home. She protested continuously, but did not contact the Internal Revenue Service (R. 124–125).

5. The trial court, in its charge, called the jury's attention to the allegation of the first count that petitioner's intent was to induce Davis not to examine petitioner's books. The court invited the jury's close scrutiny as to whether the charge concerning this particular, specific intent was supported beyond a reasonable doubt (R. 130–132).

On the question of entrapment, the court instructed (R. 134):

> Now the law with respect to entrapment is this: if a government agent by improper means or overbearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.
>
> Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.
>
> The burden of proof with respect to entrapment is on the defendant. And you are to ask

> yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means.

There were no exceptions to the charge by either party (R. 137). The jury acquitted on count 1 and found petitioner guilty on counts 2, 3, and 4 (R. 137). Petitioner filed no motion for judgment of acquittal during the trial and no motion for a new trial, but did file a motion for judgment notwithstanding the verdict on counts 2, 3, and 4 (R. 6).

ARGUMENT

1. Petitioner claims (Pet. 16–23) that the evidence adduced by the government at his trial shows that he was entrapped and that therefore he was entitled, as a matter of law, to an acquittal. Petitioner, however, by failing to move for a judgment of acquittal at the close of all the evidence, has failed to preserve for appellate review his claim that the evidence was insufficient to sustain his conviction. Rule 29, F.R. Crim. P.; *Cratty* v. *United States*, 163 F. 2d 844 (C.A. D.C.); *Costner* v. *United States*, 271 F. 2d 261 (C.A. 6), certiorari denied, 362 U.S. 952; *Corbin* v. *United States*, 253 F. 2d 646 (C.A. 10); *Picciurro* v. *United States*, 250 F. 2d 585 (C.A. 8); *Ege* v. *United States*, 242 F. 2d 879 (C.A. 9). Petitioner plainly has not shown such manifest injustice or "plain error" as to call for review under Rule 52(b), F.R. Crim. P., not-

withstanding his failure to raise the point in the trial court. Cf. *Battle* v. *United States,* 206 F. 2d 440 (C.A. D.C.); *Lockhart* v. *United States,* 183 F. 2d 265 (C.A. 4).

Petitioner's claim here is plainly an afterthought, based upon the verdict of acquittal on count 1. Petitioner erroneously assumes (Pet. 20) that, since he was acquitted on this count, the government evidence relating to that count must be rejected *in toto,* while his own account of the events of October 21, 1961, must be taken as true. The trial court, however, very strongly suggested in its charge that the government had failed to establish beyond a reasonable doubt the specific intent alleged in count 1 to conceal the sales and receipts of petitioner's business for previous years, in view of the uncontradicted evidence that those records were subsequently made available to the agent. Consequently, it appears that this was the reason for the jury's acquittal on this count. In any event, there is no requirement that a jury's verdict on various counts be consistent. The verdict therefore must be judged, like any other verdict of guilty, upon the basis of all the evidence submitted to the jury.

The evidence at petitioner's trial clearly does not establish as a matter of law that he was entrapped into the payment of money to the federal agent for an improper purpose. In fact, it is difficult to understand upon what basis petitioner's claim of entrapment was even submissible to the jury. The testimony of Agent Davis was that the suggestion and the importuning originated entirely with petitioner. While

Agent Davis unquestionably made an effort at the meeting on October 24 to lead petitioner to confirm the attempted bribe made on October 21, this action clearly did not constitute implanting the original intent or design to commit the crime, which is the essence of entrapment. *Sorrells* v. *United States,* 287 U.S. 435, 441, 453 (majority and concurring opinions); *Sherman* v. *United States,* 356 U.S. 369, 372, 382 (majority and concurring opinions).

Petitioner's own testimony, even if taken as completely true, does not show entrapment. He testified that at the meeting on October 21, upon his own initiative, he invited the agent to assist him in preparing his books and his returns for the payment of the tax and that he paid the $420 for that purpose alone. He testified to virtually nothing relative to the meeting on October 24, except that he got nervous and upset because it did not seem to him that the agent was there for the purpose for which he came on October 21.

2. Petitioner also failed in the trial court to preserve for appellate review his present claim (Pet. 24–27) that the trial court's instructions on entrapment were erroneous since he made no exception to the charge (R. 137). In any event, his contentions are without merit.

Petitioner criticizes the entrapment instruction on two grounds. First, the trial court instructed that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to men of ordinary firmness" (see *supra,* p. 10). Petitioner argues that the correct standard is whether he, not the ordinary person, was

entrapped. However, the trial court's statement is fully consistent with that of the Court in *Sherman* v. *United States*, 356 U.S. 369, 372, that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." And the statement is in substance identical with the language of the concurring opinion in *Sherman*, 356 U.S. at 384, that agents "should act in such a manner as is likely to induce to the commission of crime only those persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations."

Second, petitioner urges that the court should not have instructed that the burden of proof with respect to entrapment is on the defendant. Conceptual variations as to the nature of entrapment may lead to differing conclusions as to whether it is a defense, whether the burden of proof rests upon the defendant or the government, and whether an initial burden is upon the defendant which is discharged by a *prima facie* showing of entrapment, thus shifting to the government the burden of proving the defendant's ready complaisance to commit the offense. There is no necessity, however, for considering such issues in this case. As we have seen (pp. 12–13), petitioner neither objected to the instruction nor did the evidence of either party sustain a possible inference of entrapment. Any claimed error in the form of the instruction is therefore irrelevant. *United States* v. *Kabot*, 295 F. 2d 848, 855 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *DiDonna*, 276 F. 2d 956 (C.A. 2); *United States* v. *Pagano*, 207 F. 2d 884, 885 (C.A. 2).

3. The electronic recording made of the conversation on October 24 between petitioner and Agent Davis was

properly admitted in evidence, under the authority of this Court's decision in *On Lee* v. *United States*, 343 U.S. 747. There, a federal under-cover agent, who was an old acquaintance of the defendant, went to the defendant's place of business with a radio transmitter secreted on his person and engaged the defendant in conversation. This Court held that a federal agent could testify concerning incriminating statements made by the defendant which he heard over a radio receiver. If anything, the facts of the instant case are more favorable to reception of the recording in evidence. Here, the agent was invited to the meeting with petitioner; there was no pre-existing personal relation between the two men; petitioner knew that he was talking to a federal agent; and the agent who talked to petitioner personally testified to the conversation and was subjected to cross-examination. Agent Davis merely used an instrument to record his conversation with petitioner, in order to prevent relying at the trial entirely on his own paraphrase of the conversation which would necessarily be somewhat inaccurate and to avoid the old problem, which arises frequently in bribery cases, of "an oath against an oath." This procedure, which involves no invasion of privacy, is neither offensive to a sense of fair play nor a violation of the Fourth Amendment.[1]

[1] Contrary to petitioner's contention (Pet. 29–34), *Silverman* v. *United States*, 365 U.S. 505, is inapposite. There, the Court held that the defendant's Fourth Amendment rights were violated because the government had, through a mechanical device, physically entered defendant's premises without authorization. Here, Agent Davis was invited by petitioner into petitioner's office, where the conversation occurred.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

AUGUST 1962.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 28 1962
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

EDWARD J. DAVIS
11 Pemberton Square
Boston, Massachusetts.
Attorney for Petitioner.

GERALD F. MULDOON
10 State Street
Boston, Massachusetts
Of Counsel

Blanchard Printing Company, Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinion of the Court Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions, Statutes and Rules of Court Involved	3
1. The Fourth Amendment, Constitution of the United States	3
2. Rule 52(b), Federal Rules of Criminal Procedure	3
3. Section 4231(6), Internal Revenue Code of 1954	3
4. Section 4232(b), Internal Revenue Code of 1954	4
Statement of Case	4
Argument	16
I. It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon	16
II. Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant	26
III. It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversa-	

Page

tion of the government agent with the petitioner, which the agent surreptitiously obtained while in the petitioner's office, and to admit the testimony of the agent of the conversation where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment 32

Conclusion 49

Table of Citations

Cases

Accardi v. *United States*, 257 F.2d 168 24

Adams v. *United States*, 192 U.S. 585 44

Boyd v. *United States*, 116 U.S. 616 ..... 42, 44

Bram v. *United States*, 168 U.S. 532 45

Butts v. *United States*, 8 Cir., 1921, 273 Fed. 35, 38, 18 A.L.R. 143 17

Clyatt v. *United States*, 197 U.S. 207, 221-222 29

Entick v. *Carrington* 44

Goldman v. *United States*, 316 U.S. 129 ..... 35, 36, 39

Gouled v. *United States*, 255 U.S. 298 ... 40, 42, 43, 45, 47

Hansford v. *United States*, 303 F.2d 219, 222 ..... 19, 29

Irvine v. *California*, 347 U.S. 128, 142, 143 41

Johnson v. *United States*, 318 U.S. 189 29

Lanza v. *State of New York*, 82 S. Ct. 1218, 1220 ... 40, 41

Mapp v. *Ohio*, 367 U.S. 643 43

Miller v. *United States*, 120 F.2d 968 26

Olmstead v. *United States*, 277 U.S. 438 35

On Lee v. *United States*, 343 U.S. 747 ..... 35, 36, 39

Screws v. *United States*, 325 U.S. 91 ..... 29, 32

Sherman v. *United States*, 356 U.S. 369 ..... 18, 30

Page

Silverman v. *United States*, 365 U.S. 505 ..... 35, 36, 37, 39, 40, 47

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 42

Sorrells v. *United States*, 287 U.S. 435 ..... 17, 18, 21

Todisco v. *United States*, 298 F.2d 208, cert. den. 368 U.S. 984 ..... 47, 48, 49

United Brotherhood of Carpenters and Joiners v. *United States*, 330 U.S. 395, 411, 412, 67 S.Ct. 775, 91 L.Ed. 973 32

United States v. *Atkinson*, 297 U.S. 157, 160 29

United States v. *Kabot*, 295 F.2d 848, cert. den. 369 U.S. 803 ..... 47, 48

United States v. *Klosterman*, 248 F.2d 191, 192, 3 Cir., 1957 ..... 18, 19, 20

United States v. *Landry*, 257 F.2d 425 ..... 28, 29

United States v. *Lipshitz*, 132 F.Supp. 519 46

United States v. *Pincourt*, 3 Cir., 159 F.2d 917 32

United States v. *Rabinowitz*, 339 U.S. 56, 74 42

United States v. *Rappy*, 2 Cir., 157 F.2d 964, 967 32

United States v. *Sherman*, 200 F.2d 880 30

Weeks v. *United States*, 232 U.S. 383 (1914) 42

Wolf v. *Colorado*, 338 U.S. 25 43

Miscellaneous

Constitution of the United States:
Fourth Amendment ... 3, 32, 36, 40, 41, 42, 43, 45, 49
Fifth Amendment 43, 45
Federal Rules of Criminal Procedure,
Rule 52(b) 3, 26, 30, 31, 32
Internal Revenue Code of 1954: Sec. 4231(6) 3
Sec. 4232(b) 4
26 U.S.C. Sec. 4231(6) 3
Sec. 4232(b) 4
28 U.S.C. Sec. 1254(1) 2

In the
Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

Opinion of the Court Below.

The United States Court of Appeals for the First District, on June 15, 1962, without opinion, ordered, adjudged and decreed that "the judgment of the District Court is affirmed."

Jurisdiction

The judgment of the Court below was entered on June 15, 1962. The petition for a writ of certiorari was granted on October 15, 1962. Jurisdiction of this Court is invoked under 28 U.S.C. s. 1254(1).

Questions Presented

I. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon.*

II. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent which the agent surreptitiously obtained while in the office, and to admit the testimony of the agent of the conversation, where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

Constitutional Provisions, Statutes and Rules of Court Involved

1. *The Fourth Amendment provides*—

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. Rule 52(b) *Federal Rules of Criminal Procedure* reads:

> "*Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

3. Section 4231 of the Internal Revenue Code of 1954, 26 U.S.C. 4231, provides that:

> "There is hereby imposed:
>
> (6) Cabarets. — A tax equivalent to 10 percent of all amounts paid for admission, refreshment, service, or merchandise, at any roof garden, "cabaret, or other similar place furnishing a public performance for profit, by or for any patron or guest who is entitled to be present during any portion of such performance. The tax imposed under this paragraph shall be returned and paid by the person receiving such payments; except that if the person receiving such payments is a concessionaire, the tax imposed under this paragraph shall be paid by such concessionaire and

collected from him by the proprietor of the roof garden cabaret, or other similar place. No tax shall be applicable under paragraph (1) or (2) on account of an amount paid with respect to which tax is imposed under this paragraph . . ."

Section 4232(b) of said Act provides:

"b" Roof Garden, Cabaret or Other Similar Place. —The term "roof garden, cabaret, or other similar place," as used in this chapter, shall include any room in any hotel, restaurant, hall, or other public place where music and dancing privileges or any other entertainment, except instrumental or mechanical music alone, are afforded the patrons in connection with the serving or selling of food, refreshment, or merchandise."

Statement of Case

The petitioner, German S. Lopez, on October 24, 1961, had been conducting a restaurant and liquor business under a lease arrangement since March 1959 at Clauson's Inn, Falmouth, Massachusetts. (R. 102).[1] (R. 2, 3, 4, 5).

The petitioner was indicted on four counts on bribery charges, in violation of Title 18, U.S.C. section 201.

Count 1 alleged that the defendant on October 21, 1961 bribed Roger S. Davis, a Revenue Agent in the United States Internal Revenue Service by giving him $420 with intent to induce said Davis to omit to do an act in violation of his lawful duty, to-wit:

"to refrain from making an examination of the books and records relating to sales and receipts of the bar

[1] R. refers to Transcript of Record.

and lounge at Clauson's Inn, for the years 1959, 1960 and the first two quarters of the year 1961, from computing tax on said sales and receipts, and from reporting same to the Internal Revenue Service."

Counts 2, 3 and 4 charged that petitioner on October 24, 1961, did give as bribes to said Agent Davis respectively, in Count 2, $200.00, in Count 3 a promise of $200.00, in Count 4, a thing of value, to wit: an expense-paid weekend accommodation for said Roger S. Davis, his wife and family, at the Honeymoon Cottage, Clauson's Inn, North Falmouth, Massachusetts—with intent to influence him to aid in committing fraud on the United States, to wit: to conceal from the Internal Revenue Service of the Treasury Department of the United States the sales and receipts and any cabaret tax due thereon of the bar and lounge of Clauson's Inn, North Falmouth, Massachusetts, for the years 1959, 1960, 1961 and thereafter. (R. 2-5).

The government's case at the trial with respect to the matter of cabaret tax attaching to the defendant's business operation proceeded on the basis that dancing or singing in connection with the orchestra or juke box playing in the bar and lounge area of Clauson's Inn would create a cabaret tax on sales in this area during such entertainment. (R. 9-12).

On January 31, 1962, the jury returned a verdict of Not Guilty on Count 1 and a verdict of Guilty on Counts 2, 3 and 4. (R. 1).

On February 6, 1962, the petitioner filed a Motion for Judgment for the defendant on Counts 2, 3 and 4 of the indictment, notwithstanding the jury's verdict. (R. 1).

The petitioner relies on Federal Rules of Criminal Procedure, Rule 52(b), on Questions I and II, supra, for right of review thereof.

At the trial, the Court admitted a wire recording of a

conversation of the petitioner with a government agent at the private office of the petitioner on October 24, 1961, and the testimony of the agent of the conversation, which were objected to as in violation of the Fourth Amendment. (R. 71-74). Later at the trial the petitioner raised the question of illegal entrapment at the time of argument, and the issue of entrapment was made part of the Trial Court's charge. (R. 133, 134). It is submitted that if the evidence ought to have been excluded when presented, the defendant's rights thereto ought not to be precluded by the status later arising under the defense of illegal entrapment.

The following facts are uncontrovertible on the record.

1. Agent Davis testified that on August 31, 1961 he visited and observed the defendant's operation at Clauson's Inn, Falmouth, Massachusetts as a routine visit (R. 10, 33), twice the same day, and that prior thereto he had no knowledge of the operation. On the second visit, in the evening of the same day he testified he saw dancing in the lounge in connection with the entertainment, that he did not see the defendant and left the premises.[2] (R. 10)

2. Agent Davis testified that between August 31, 1961 and October 21, 1961 he did not have the defendant's business at Clauson's Inn under surveillance, and that during this time he did not visit the premises, and did not receive or make any report as to the defendant's business at the Inn; that he had no knowledge of what took place in the operation before October 21, 1961, excepting his alleged observance on the evening of August 31, 1961. He further

---

[2] In this connection, if there was dancing, there was no evidence that the defendant knew of it.

The defendant testified that on the evening of August 31, 1961 in the course of his work he was in and out of the bar and lounge at the Inn while Agent Davis was there. That he observed him there and saw no dancing in the area. That there was a sign displayed of "No Dancing" (which was introduced in evidence).

testified that he came on his visit to the Inn on October 21, 1961 alone, without prearrangement, as a routine visit to ascertain its activity with reference to cabaret tax liability (R. 32, 33).

3. The record is barren of any activity in the defendant's business operation at Clauson's Inn which would create a cabaret tax liability at any time prior to October 16, 1961.[3]

4. The testimony of Agent Davis was that at the meeting of the defendant with him on October 21, 1961, at Clauson's Inn, the defendant offered him a bribe to avoid the aggravation of an examination for cabaret tax liability for the period prior to the then tax quarter ending October 31, 1961, on the stated situation that the defendant had never filed a cabaret tax return applicable to the business. He further testified in this connection "that he (the defendant) didn't wish to be bothered filing any past tax returns for any past period going back to the time he was in business or started in business." (R. 14) Agent Davis'

---

[3] Agent Davis testified in cross-examination:

(The following question is read:

[56] "Q. What was the basis of your stating to Mr. Lopez on the night of October 21, 1961 that there would be a cabaret tax prior to October 17, 1961 in the figure that you now say you mentioned?

A. Sir, October 17th didn't enter into this."

"XQ. May I substitute the date of October 21, 1961 in the previous question? And would you give me an answer.

A. The figures discussed on October 21st related to a year, a year's figure.")

A. The basis of that, sir, was that I believe, the conversation that night, he stated that he had this Trio and a piano player for a period of time. Since this was October 21, I assumed it was for the period previous to October 21st. The basis of the calculation was that, the figure he gave me for $160,000 gross sales—the figure of $60,000 total sales for the bar and lounge, and his estimate of one-half of that, or $30,000 sales at night, and an estimate of tax would be $3,000." (R. 41)

He further testified in that connection "I did not tell him that he owed any money." (R. 43)

XQ. What right did you have to tell this man that he owed money for a year without an examination of books, and without

evidence with respect to examination of the books of the business, at this meeting, was that he would examine the same later when convenient. (R. 36-38)

His evidence was that he would return the following Tuesday in connection with the preparing of a 720 Form applicable to the quarter period ending October 31, 1961. (R. 47, 51) It was manifest at the meeting that the books did not carry cabaret tax data prior to October 16, 1961 and that the existence of cabaret tax liability related to the entertainment described which was collateral to the books. (R. 168). Davis testified that he was an accountant (R. 41).

5. Agent Davis testified that the events of the meeting on October 21, 1961 at the Inn, relating to the alleged bribe, took place in the defendant's office. That the defendant and Davis were alone at all times and there was no corroborating witness. (R. 33)

Davis testified that at this meeting $200. was placed on the desk in the office by the defendant and offered to Davis

---

any basis in fact that there was entertainment, including dancing, for the year 1961?

A. I did not tell him that he owed any money.

Agent Davis testified on cross-examination:

"Q. Is that your position now, that you did not tell him that night that you were just using figures at random, without having any purpose?

A. I did not tell him he owed any money to the government for the year 1961.

J. Did you tell him he owed any money that night for the year 1960?

A. I told him—? No, sir.

Q. Did you tell him that night he owed any money for 1959? A. No, sir.

Q. Was there a basis then for a cabaret tax prior to August 31, 1961?

A. I don't know, sir." (R. 43, 44)

There is in evidence Defendant's Exhibit B showing the ledger entry made on October 16, 1961, which reads. "Oct. 16, 1961 Change in policy of entertainment. From this date Liquor Sales subject to cabaret tax during entertainment hours. This tax is to be deducted from beverage sales which are subject to a rent charge." (R. 120)

by the defendant with the request "to drop the case"; that this was repeated and that Davis refused each offer with the statement that he had a job to do, "to examine the books"; that later at the meeting the defendant "added some bills to it", which then made the amount $420., which was offered and refused. That the defendant got angry and insisted. Then, Davis stated, "I told him—I asked him how much money was on the desk, and he said $420". About that time I picked the money up. It was about 10 o'clock. I put it in my pocket and left the office. (R. 15).[4]

Emanuel Shuster, Regional Director of the United States Internal Revenue Inspection Service, testified that the regulations of the Internal Revenue Service was that if a bribe was offered, or if there were facts indicating that a bribe might be offered the agent was to divert the subject, terminate the meeting and leave. (R. 101)

6. Agent Davis further testified on cross-examination as follows:

> "Q. I refer to the transcript, page 29, lines 21 to the end,
>
> 'Q. Now coming back to the night of October 21, 1961 when you visited the premises there, in your conversation on the occasion did you agree on some basis with Mr. Lopez to fill out Form 720, the cabaret tax, in connection with Mr. Lopez' business at Clauson's Inn in Falmouth?
>
> A. I did not agree to fill out forms.
>
> The Court: The way you gave the answer, it would not appear on the record, because you gave

[4] The defendant's testimony was that he had given the agent $420 to do what was required on his own time, not the government's, for cabaret tax returns on the business (R. 111, 112).

it with an intonation. Will you please explain what you mean?

Q. Will you follow his Honor's suggestion?

The Court: Read the question and the answer please, Mr. Duffy.

(Question and answer were read.)

The Witness: Your Honor, I didn't agree to fill out the form. That is not my job. *What I agreed to was to return to the premises so that he could file a return, if due.* (Italics supplied).

Q. When you made that answer was the answer true?

A. Yes, sir.

Q. Is it true now?

A. Yes, sir." (R. 51)

7. The Revenue Inspection Service organized a plan to entrap the defendant by arranging for Davis to go to Clauson's Inn on October 24, 1961 and meet with the defendant at the defendant's private office. (R. 16, 17)

Richard A. Callahan of the said Service testified that on October 24, 1961 he placed a Minifon recording on the person of Agent Davis, which was concealed, and also a Schmidt battery operated radio transmitter, with instructions to Agent Davis as to what he should do, when he went to Clauson's Inn in Falmouth (R. 66, 67) The evidence was that the Schmidt did not work. (R. 67)

Callahan testified:

Q. State what those instructions were.

A. I instructed Agent Davis to try to steer the conversation back to the meeting of October 21 when he allegedly received $420, and I gave him certain instructions as to how to lead into that.

I told him that he should explain, go into a mathematical explanation as to what he thought was due tax-wise, and I also gave him technical instructions in that he should steer Mr. Lopez to a quiet place; possibly his office, not to rustle papers and to sit as close to Mr. Lopez as possible in the course of the conversation." (R. 67)

The witness Callahan described the Minifon recording device and as to how it was attached to the person of Agent Davis, and its operation. (R. 67)

Witness Callahan further testified."

"Q. As part of your instructions, did you say to him, 'Get the conversation back to the 21st. Get a general discussion as to what had occurred on the 21st.'

A. Yes, sir, I did.

Q. Did I understand you also to say, 'Give him some figures, tell him what you think is owed.'

A. Yes, sir. His opinion.

Q. His opinion?

A. Yes, sir.

Q. Now at that time did you have any facts, as far as you were concerned, as to whether anything was owed at all, any basis in fact whatsoever?

A. No, sir." (R. 94, 95)

8. Agent Davis testified that in concert with Agents from United States Revenue Inspection Service he came to Clauson's Inn on October 24, 1961, that one of the Agents entered the Inn, but not in his company, and other Agents waited outside of the Inn. The agents who waited

outside had instruments to be operated so as to record sound communications from the Schmidt, if it worked.

Davis entered the private office of the defendant upon his request to the defendant pursuant to instructions.

The Minifon recording of what occurred in the office was introduced and played to the jury over the objection of the defendant, and marked as Government's Exhibit 6 (R. 75).

The defendant contends that the Minifon recording (Exhibit 6) establishes the following facts.

(1) Pursuant to plan Agent Davis by his request obtained entrance to the private office of the defendant on October 24, 1961.

(2) Agent Davis introduced "this 720 excise form we were talking about", and the defendant immediately exhibited his mind by a verbal act: "I—never did file cabaret tax. I never thought there was need of it." This exhibited the mind of an innocent man with respect to the subject of cabaret taxes of the business, and his relation to the occurrences of the meeting of October 21, 1961.

(3) Nevertheless the agent pursued the plan of entrapment. The following then occurred.

> "Davis: I had to do a little thinking about it. I want to give you a couple of figures now. I mean it took me a while." (R. 81)

A colloquy ensued on the subject of confidences between the defendant and Agent Davis, and the Agent pursued the matter of figures as follows:

> "Davis: O.K. I am going to put down some figures here. Your gross was about, gross sales about 160,000.
>
> Lopez: About 160,000.
>
> Davis: Now 40% of that is—

Lopez: I should say about 30, about 35, conservatively.

Davis: Well, we'll say about $50,000 is bar sales.

Lopez: Ya.

Davis: Now—maybe roughly half of that is at night.

Lopez: Well, I should say about half of that should be at night.

But I should say perhaps, you see, my dining room is a big seller and the bar, and my dining room sells and the the bar.

Davis: Ya, I understand that.

Lopez: This is the greatest. You see a very busy night at the bar, the bar itself may sell $150, $175, a good steady night in the lounge itself.

Davis: Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year." (R. 84)

The defendant contends that the statement of Agent Davis, "Well, I kind of figure that based on what I've seen, the amount of cabaret sales would be for a year" was completely false without any basis in fact.

The colloquy continues:

"Davis: No I'd say $20,000, conservatively 25 would be cabaret sales because

Lopez: No.

Davis: Well, . . . the band and everything.

Lopez: *Most of the business . . . at night when people actually get up and dance I have not been allowed to stop it. Which would be Friday and Saturday nights. The other nights we don't have anything anyway. The other nights is a minor thing that I can always control, but Fridays and Saturday nights in*

the summer months, when I'm very very busy, I often neglect to get up there and do it." (Italics supplied)

At this point on the basis of the defendant's statement there was no intentionally allowable dancing and thus no cabaret tax, in the absence of special facts. This was clearly the mind of the defendant as expressed at the outset of the meeting.

There then ensued the following with reference to the acts of Agent Davis indicating to the defendant that he was not using the quoted figures

"Davis: Well, I'm not . . .
Lopez: That's right.
Davis: I'm not using this." (R. 84, 85)

This statement of the Agent was an obvious fraud. The only time dancing occurred on the evidence was as stated by the defendant; and if that were excluded from consideration there would be no basis whatsoever to claim a tax. This fraud continues "You know just between you and I, I would say about $20,000 in taxable sales. You say your business isn't that much. Now, look, you went into business in 1959. In 1959 the tax was 20%." (R. 84)

The colloquy continues: (R. 84)

"Lopez: I only operated about six months under the 20%.
Davis: Well, that was 1959 and half of 1960.
Lopez: Ya.
Davis: Between 1959, out of the $20,000 could be maybe—
Lopez: Make it 5,000 . . .
Davis: Well, I'm trying to figure. You were open from March on. The big trade is in the summer.
Lopez: Ya.

Davis: Maybe 15,000. At 20% that would be $3,000.00 for 1959. In 1960, 5 months at 20%; the rest of this is 10%, do you remember that?

Lopez: Ya. . . .

Davis: Well, . . . about 20. And 8 of this was under the 20%; 8,000 and 12 was under the 10%. So, $8,000.00 at 20% would be 4,000. 12,000 at 10% would be 1,200. In 1961, well for half the year . . . 16,000; cabaret $3,000.00. No—

Lopez: You're very high Actually, I mean, you're very high.

Davis: Let's see what we have here anyway. (Counting) 2, 2, 4 ,8, $11,200. Well, let's say . . . just for argument purposes — Between 9 and 10,000 dollars; that we know is — You havn't kept any records, you see. Now, I mean, I don't know what . . . exactly what your records show. How are your books? Do your books show any balance sheets?

Lopez: It shows just the

Davis: Well let's go back to the $10,000.00. The penalty for not filing any returns is 25%. $12,500 back taxes, conservatively, . . . plus 6% interest, which will go on to here will I'd say run over $13,000.00 *Now I don't want to get greedy or anything, but, well, what would you be gaining* . . . (R. 85) (Italics supplied)

Lopez: I have got a couple of hundred odd dollars for you right now. Listen—

Davis: Ya, but I mean, well—

Lopez: I have . . . money right now.

Davis: I know but—

Lopez: I'll tell you I'd like to pay as we go along and I'd like you to take me into your confidence. As we go along a couple of hundred every time you drop in. I'd like to keep it that way.

Davis: Well,

Lopez: Don't drop in too often.
Davis: How much is here?
Lopez: Two hundred, keep it." (R. 86)

The foregoing statements of Agent Davis were grotesquely fraudulent without any basis in fact. His statements became so reckless that he was stating, "So, 8,000 at 20% would be $4,000." and ended up with a mythical penalty.

The statement following the penalty, "now I don't want to get greedy or anything but, well, what would you be gaining"—is the request for the bribe.

The defendant contends that Agent Davis fabricated a false and fictitious claim in the mind of the defendant that a United States cabaret tax was due on his business, without any basis in fact and grossly inordinate with respect to the circumstances of the defendant, and that the Agent induced, provoked and in effect requested the defendant to bribe him to avoid the so-called claim; that the facts were further aggravated by the perilous position of the Agent Davis, who had received $420. from the defendant on October 21, 1961, allegedly as a bribe in connection with such a tax, in the situation where the Agent was alone with the defendant and without a corroborating witness and in any event in violation of regulations in his Department.

Argument

I. *It is apparent on the Record that the issue of illegal entrapment was duly raised at the trial and that there was illegal entrapment of the petitioner as to the offenses alleged in Counts 2, 3 and 4 of the indictment as a matter of law, and the petitioner was entitled to a verdict of acquittal thereon.*

Appellant contends that the uncontradicted facts in this case establish that he was entrapped as a matter of law

and that he was entitled to a verdict of not guilty and a judgment of acquittal on Counts 2, 3 and 4.

1. The much-cited case of *Sorrells* v. *United States*, 287 U.S. 435 is the foundation for the applicable law. Under this case entrapment is raised by the plea of not guilty.

The governing principles are stated in *Sorrells* at pages 441, 442:

> "It is well settled that the fact that officers or employees of the government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution.' Artifice and stratagem may be employed to catch those engaged in criminal enterprises. [Citing cases.] The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design * * *. A different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."

The Court went on to cite *Butts* v. *United States*, 8 Cir., 1921, 273 Fed. 35, 38, 18 A.L.R. 143, to the effect that it is unconscionable and contrary to public policy to punish a man for a crime he evidently would never have committed were he not inspired, incited, and persuaded by officials of the law. The Court decided that under such circumstances no crime was committed, for Congress could not have intended that an act within the literal meaning of a criminal statute would be a crime if incited by those whose purpose it is to prevent crime. Traps and decoys are sometimes permitted. "The predisposition and criminal designs of the defendant are relevant." 287 U.S. at page 451, 53 S. Ct. at page 216.

Sherman v. *United States*, 356 U.S. 369, held that the undisputed testimony established entrapment as a matter of law. On the record, a narcotics user under treatment for the addiction, as to whom there was no evidence that he was then in the trade was induced to make three sales of narcotics by a government agent. Except for a record of two convictions nine and five years previously, there was no evidence that petitioner himself was in the trade or that he showed a "ready complaisance" to the informer's request.

The court adhered to the majority opinion in *Sorrells* v. *United States, supra.* and declined to reassess the doctrine of entrapment according to the principles announced in the minority opinion which concurred in the result.

Sherman v. *United States, supra,* affirms, as did the *Sorrells* case, that entrapment occurs only when the criminal conduct "was the product of the creative activity of law-enforcement officials". It held further, "to determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent, and the trap for the unwary criminal."

The Court further said, "The principles by which the courts are to make this determination were outlined in *Sorrells.* On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence."

2. The appeal to the Circuit Court below involved the defence of entrapment and presented to the Court the issue of whether the criminal intent proceeded from government agents or whether these agents simply afforded opportunities to one already disposed to the alleged criminality. *United States of America* v. *Klosterman*, 248 F.2d 191, 192. Third Circuit, 1957.

Klosterman decided that the test to be applied under the principles governing illegal entrapment is, was the defendant a man otherwise innocent who would not have committed the crime but for official solicitation, or *was he predisposed to pursue a criminal design which he had already conceived?* (Italics supplied.)

In *Hansford* v. *United States*, No. 16432, United States Court of Appeals, District of Columbia Circuit, May 3, 1962, 303 F.2d—No. 2, 219 at 222, the Court defined an "innocent" person under the law of illegal entrapment.

The Court stated: "Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official."[5]

---

[5] In *Hansford* v. *United States*, 303 F.2d - No. 2, 219, the Court in a majority opinion (FAHY, EDGERTON, BAZELON, WASHINGTON, DANAHER, BURGER and PRETTYMAN) held: "Testimony by police officer in rebutting claim of entrapment in sale of narcotics as to prior alleged sales made by defendant which officer claimed he had witnessed was inadmissible and prejudicial when testimony of officer was not corroborated by production of alleged contemporaneous police report or otherwise substantially corroborated."

The Court said: ". . . as further stated by the Court in Sherman when quoting from Sorrells: 'Entrapment occurs only when the criminal conduct was 'the product of the *creative* activity' of law-enforcement officials.' 356 U.S. at 372, 78 S. Ct. at 821. These statements largely dispel the ambiguity that arises from an unexplained reference to an 'innocent' person. If the term 'innocent' is to be used at all—it is preferable to avoid its use altogether—it should be explained so that the jury will understand that a criminal record does not disqualify an accused from defending on the ground of entrapment. A person is not entrapped when an officer merely presents him with the opportunity to commit an offense in order to detect criminality, rather than to instigate it. But readiness or predisposition is not established by evidence that the person is not 'innocent' in that he has a criminal record. Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official. The defendant, in such circumstances, must be considered a previously innocent person. A criminal record is relevant in regard to a predisposition or propensity, but does not preclude the defense of entrapment."

On the facts of *Klosterman*, Deeney, an Internal Revenue Agent approached a fellow agent, King, with respect to a tax-payer's return then under investigation for an unusual time, with the statement that a friend of his who was an associate of the taxpayer, reported that the taxpayer would pay ten to twenty thousand dollars to settle the case. On the record, Deeney abandoned the original plan, and later was relentlessly pursued by the fellow agent under orders of their superiors to carry out the plan to bribe until the defendant yielded and agreed to arrange for a meeting of the other agent with taxpayer's associate. The Court applied the above-said test as to Deeney and held on the record, he was entrapped to commit bribery.

The Court stated: "The inordinate amount of persuasion of Deeney by King indicates two elements in this case. It clearly discloses that Deeney was sincere in his attempt to abandon his original plan. It shows also that the criminal design and intent for the commission of the actual bribery originated not with him but rather with the government agents who engineered the persuasion and solicitation."

In *Klosterman* the associate of the taxpayer, co-defendand Stafford, was not guilty at the trial of conspiracy charges with Deeney and the taxpayer Klosterman, and so nothing which Deeney told King could apply to Stafford. However, "his knowledge of the financial arrangements involved in the criminal plan indicates that he talked to Deeney about them." (Page 195) "The admissible evidence in the record as to Stafford, then, discloses only that he met with King, as a result of the persuasion of Deeney by King." (Page 195)

In holding illegal entrapment as a matter of law on the record, the Court said, Page 196: "In order that the solicitations directed toward Stafford be within the sphere of proper law enforcement, the government must show a

predisposition and criminal design on Stafford's part. *Sorrells* v. *United States*, 287 U.S. at page 451, 53 S. Ct. at page 216. This record is devoid of admissible evidence that would indicate to government agents that before they conceived of the plan of persuasion through King, Stafford was other than an innocent man. No previous criminal record was shown and no reputation evidence was introduced to that end. *It is our view that in a crime of this nature, occurring as it does usually only once and not in a series, is not like the sale of narcotics or of contraband liquor, so it is virtually impossible to show a course of conduct.* (Italics supplied.) Thus, Deeney, the entrapped victim of the government scheme, in turn entraps Stafford, an innocent person. *We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man.*" (Italics supplied.)

In the instant case it is impossible logically to sustain on the evidence that the defendant on any basis whatsoever was pursuing a criminal design "which he had already conceived", with relation to the events of October 24, 1942 at the meeting of Agent Davis and the defendant at Clauson's Inn. The meeting was organized and carried out by the government agents to entrap the defendant. (Statement, Par. 7, supra) The genesis of the meeting of October 24, 1961 and of the events that occurred at the meeting originated with the government agents after October 21, 1961.

On the record, there was no evidence of cabaret excise taxes due by the defendant prior to October 16, 1961. (R. references, Brief P. 6, footnote 2, P. 8, footnote 3, P. 11) At the trial, the government agents testified they knew of no such tax obligations. (R. references, Brief P. 8, footnote 3, P. 11) Agent Davis testified that at the meeting of October 21, 1961 with the defendant he never stated to the

defendant that said taxes were due by the defendant. (R. reference, Brief P. 8, footnote 3) Agent Davis at the October 24, 1961 meeting created and declared to the defendant for purpose of entrapment, completely fictitious claims for cabaret taxes, inherently and recklessly false and inordinate to the subject matter. (Brief, Statement of Case, Paragraph 8, Pages 8-16, with record references) Prior to the meeting of October 24, 1961, the defendant could not have been pursuing a "criminal design already conceived", relevant to such fictitious claims which originated with the government agent at the meeting of October 24, 1961.

On the record of this case at the trial there was no dispute that the defendant gave and agent Davis received four hundred twenty dollars on October 21, 1961. The issue was whether it was given and received as a bribe, and the jury decided that it was not a bribe under the charge.

The evidence introduced by the government as to the events occurring at the meeting of the defendant and the government agent Davis on October 21, 1961 was pertinent to establish a bribe on October 21, 1961. It necessarily related to a criminal disposition to commit bribery on October 21, 1961, if the evidence were true. It could not by its very nature sustain that he was disposed to pursue a criminal design to commit bribery on October 24, 1961 "which he had already conceived", since it is manifest that it was impossible for him to have had anything in his mind on an enterprise embracing fictitious tax claims as to which he had no knowledge whatsoever before the event.

Further, the record is positive as to the agreement of agent Davis made on October 21, 1961 with the defendant, on the testimony of agent Davis, in response to the trial court's inquiry. "What I agreed to was to return to the premises so that he (the defendant) could file a return

if due''. (Emphasis supplied.) (Testimony of agent Davis, statement, supra, par. 6.)

At the meeting of October 24, 1961 (the facts of which are established on the Minifon recording, (Statement supra, par. 8.) the criminal design as to the offenses charged in counts 2, 3 and 4 manifestly originated with the government agent Davis with the express purpose of inducing the defendant to commit the crime in order to prosecute him, and the government agent Davis induced, provoked and solicited the defendant to commit the offenses.

This position is clearly shown on the recording. (See Statement supra, par. 8.)

(1) At the outset of the meeting of October 24, 1961, as shown on the recording, the defendant disclosed an innocent mind: ''I—never did file cabaret tax. I never thought there was need of it''. (Statement, supra, Par. 8. #2.) This verbal act frustrated immediately the avowed plan of the agents to relate the conversation back to the meeting of October 21, 1961. (Statement, supra, Par. 7.)

(2) Nevertheless agent Davis pursued the plan of entrapment by false statements of the existence of excise tax obligations which culminated in the agent's solicitation of the bribe: ''Now I don't want to get greedy or anything, but, well, but what would you be gaining''—the request for the bribe. (Statement, supra, Par. 8.)

In the instant case, there was more than inordinate persuasion by the government agent; there was the operation on the mind of the defendant by the government agent of fictitious excise tax claims, recklessly false and inordinate

with relation to the subject matter and the defendant, purposed and accompanied with a statement, in effect a request for a bribe. In the framework of the facts, it could not be found on any basis whatsoever that the defendant was pursuing a criminal design "which he had already conceived", with relation to the events of October 24, 1961 at the meeting of Agent Davis and the defendant; and in causal terms, it is inescapable that the crime would not have been committed but for official solicitation.

3. *Accardi* v. *United States* held 257 F.2d 168 that

> "In rebutting the defense of entrapment, primary emphasis is on the defendant's predisposition to commit the crime, but a court must also carefully weigh the conduct of the government agents, which must not fall below reasonable standards of the proper use of government power in law enforcement."

At page 172, the Court said:

> " . . . The majority opinion in Sherman reaffirms the emphasis on the defendant's intention or readiness to commit the crime, as basic in rebutting entrapment; but the Court by no means downgrades the duty of scrutinizing closely the conduct of the government agents.[5]

Footnote 5: read in part:

> "In spite of the sharp differences between the two opinions as to the crucial question in entrapment, the conceptual basis for the defense, and the role of the court, the language of the majority of the court, shows that they attach almost as much importance as the

> minority to the *conduct of the government agents.* There is scarcely a decibel's difference in their expressions of shock and outrage at the agents' methods. 'The function of law enforcement is the prevention * * * not * * * the manufacturing of crime.'

It is submitted that when Agent Davis left Clauson's Inn on Saturday night, October 21, 1961 with $420 in his pocket which he received from the defendant, he was in a predicament. Obviously, he was in violation of regulations of his Department in any event. He had been attached to the Internal Revenue Service for two years and was an accountant. A policeman investigating a matter as routine would consider it unthinkable, to take a bribe without a corroborating witness, and then attempt to explain it to a superior. On the facts in this case he testified that he first talked with a fellow agent after leaving the Inn on the night of October 21, 1961, and then later his group chief at the instance of the fellow agent talked with Agent Davis.

There was implicit in the concerted plan of the revenue inspection service agents for entrapping the defendant in his private office the relief of the perilous status of Agent Davis. The avowed plan according to the revenue inspection service agents was to relate back by statements, cabaret tax involvement and alleged bribery, relating to the meeting of October 21, 1961. This immediately failed on the statement of the defendant at the outset of the meeting of October 24, 1961 that he never filed a cabaret tax since he thought he never needed to. In this status the procedure adopted by Agent Davis in fabricating in the mind of the defendant, as if true, a false and fictitious claim of a government cabaret tax, with outrageously exorbitant figures, ending with a thrust for a bribe in the words "I don't want to be greedy" is highly reprehensible. There

is inherent in it the aspect of gestapo or inquisition in attacking the human mind by lies and to involve the person attacked in crime. It is submitted that this cannot be countenanced, as a matter of law; certainly in conjunction with the other established facts.

II. *Where the Trial Judge, without request, gave instructions to the jury, which as a matter of law were plainly misleading and erroneous on the issue of illegal entrapment, and prejudicial to the defendant, on appeal the error is open to review for appropriate remedy, although no exception was taken by the defendant.*

It is submitted that this question presents a matter open to review under Federal Rules of Criminal Procedure 52(b) as plain error affecting substantial rights, viewed with respect to principles giving the right of review of a Judge's Charge undertaken without request, which manifestly misleads the jury by the instructions given on an essential issue, as decided in *Miller* v. *United States*, 120 F.2d 968.

In the *Miller* case the Court stated the following:

> "In a criminal case, it is the duty of a court to instruct on all essential questions of law, whether requested or not. *Kinard* v. *United States*, 68 App. DC 250, 96 Fed. 2nd, 522, 523; *Kreiner* v. *United States*, 2 Cir. 11 Fed. 2nd, 722, 731. Some courts have held that failure to instruct on the consideration to be accorded to character testimony in the absence of a request for such an instruction is not reversible error. *Kinard* v. *United States*, supra. It may be conceded that the court was not bound to instruct on character testimony in the absence of a request for such an in-

struction, but when it did proceed to instruct the jury thereon, it was required to give a correct instruction. It could not mislead the jury by an instruction which was erroneous. Misleading the jury in regard to the purpose for which they should consider character evidence adversely affected the substantial rights of the defendants."

At the trial in the instant case the Court charged the jury on the question of entrapment as follows:

"Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.

Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account of dancing, if there were, Agent Davis obviously, in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.

Now the law with respect to entrapment is this: if a government agent by improper means or over-bearing persuasion or wrongful conduct induces a person of ordinary firmness to commit a crime which he would

not otherwise commit, then under those circumstances the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means."

It is to be noted that there was no issue as to how an ordinary person would have reacted or done in the position of the defendant. The issue was whether the defendant was entrapped, not whether an ordinary person would have been.

United States v. *Landry*, 257 F.2d 425.

Further the burden of proof must be allocated. The burden is upon the defendant to produce evidence that government agents induced him to commit the crime, and when evidence has been brought out by the defendant the government must prove beyond a reasonable doubt that inducement was not the cause or creator of the crime.

United States v. *Landry*, *supra*, at 428, 429.
Hansford v. *United States*, CCA DC 303 F2d 219 1962)

The *Hansford* case also held "two-fold defense that defendant did not make sale of narcotics but that if it did occur there was an entrapment, was not ingonsistent".

In *Screws* v. *United States*, 325 U.S. 91, it was held that: "Although no exception was taken to the trial court's charge, the error was so fundamental—failure to submit to the jury the essential elements of the only offense on which the conviction could rest—that this Court takes note of it *sua sponte*."

At Page 107, Mr. Justice Douglas said: "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See *Johnson* v. *United States*, 318 U.S. 189, 200. But there are exceptions to that rule. *United States* v. *Atkinson*, 297 U.S. 157, 160; *Clyatt* v. *United States*, 197 U.S. 207, 221-222. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

In the case of *Sherman*, supra, the Court in *United States* v. *Sherman*, 200 F.2d, 880, Second Circuit, reversed judgment and ordered new trial where the Court below erred in charge on the law of illegal entrapment, where no exception was taken on same, on the grounds of Fed. Rules of Crim. Proc., Rule 52 (b), 18 U.S.C.A. At Pages 882 and 883, Circuit Judge L. Hand said: "Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it. In the case at bar plainly Kalchinian did induce the first sale, but that was irrelevant unless at that time the two had made the agreement desribed above. If they did, it would be true that the later sales resulted from Kalchinian's original inducement for it meant that he was in the market, so to say, and might buy whenever Sherman had any heroin to offer. Although, as we have said, on that issue Sherman had the affirmative the evidence to support the defence was ample, if indeed not conclusive. On the other hand since the prosecution had the burden upon the issue of the excuse for inducement, it had to satisfy the jury that Sherman did not need any persuasion; but that he stood ready to procure heroin for anyone who asked for it; and the evidence scarcely supported such a finding. . ." . . . "It is enough to demand a reversal of the conviction that the case was left to the jury upon an erroneous statement of the law. The judge concluded his colloquial charge by telling the jury to ask themselves whether the 'Government' had procured the commission of the crime 'through trickery, or fraud of the officer, or undue persuasion,' or whether what it did was 'merely (to) afford an opportunity for the commission of a crime

where the latent intent existed to commit the crime.' Whether the second alternative would have saved the charge we need not say, for in any event the jury did not understand what they were to decide, and after about half an hour came back and asked to have the charge read again. That was done, but the judge thereupon undertook to restate the law to them, concluding as follows: 'the law says you can't trick anyone into it by artifice or fraud such as giving a fabulous offer, or telling somebody that you are in excruciating pain and you must have it; or some such inducement that would put the idea into somebody's head where it never existed before.' With those as the last words on the subject the jury retired and came back almost at once with a verdict of guilty. So far as concerns the defence—*i.e.*, the inducement—it was complete without 'trickery' or 'fraud'; it includes soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged. If the prosecution sees fit to set the accused in motion, it is called upon to make good its excuse. So much was certainly wrong. Nor was this cured by the alternative which, if it was to be a cure at all, had to state the excuse. We are not sure whether 'the idea' that must not have 'existed before' in 'somebody's head'—we assume this meant the accused's—was the 'idea' of committing the particular offence charged. If so, it added nothing to 'inducement' simpliciter. If, however, the judge meant by 'the idea' a disposition to commit offences like that charged, he surely did not make it plain and the error was not corrected. On no view can we find that the cause was presented to the jury in such terms that they could apply the law as we understand it; and the error, which went to the very heart of the prosecution, was grave enough to be noticed, although the defence had not excepted to it. Fed. Rules Crim. Proc. rule 52 (b), 18 U.S.C.A."

In support of the application of Federal Rule 52 (b), the Court cited (P. 883): *Screws* v. *United States*, 325 U.S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495; *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 411, 412, 67 S. Ct. 775, 91 L. Ed. 973; *United States* v. *Pincourt*, 3 Cir. 159 F.2d 917; *United States* v. *Rappy*, 2 Cir., 157 F.2d 964, 967.

Though the established facts on the record require a finding, as a matter of law, that illegal entrapment occurred, it is submitted that in any event the Court's charge was erroneous and misleading on the law of entrapment, and prejudicial to the Defendant.

III. *It is a violation of the Petitioner's rights under the Fourth Amendment, and prejudicial error, where a government agent obtained entry by misrepresentation into the private office of the petitioner, for the Trial Court to permit to be played to the jury a wire recording of conversation of the government agent with the petitioner, which the agent surreptitiously obtained while in the petitioner's office, and to admit the testimony of the agent of the conversation where objection was duly made on said constitutional grounds and the evidence constitutes the government's case as to Counts 2, 3 and 4 of the indictment.*

After hearing, with evidence taken, of the Defendant's Motion and Petition to Suppress Evidence (R. 138, 164, 165) the Court denied the Motion to Suppress the Minifon recording, and the defendant's objection was renewed at the trial (R. 71 and 72) on the grounds that its admission and the admission of the testimony of Agent Davis of the recorded conversation was in violation of the Fourth Amendment. The grounds of the defendant's

objection and the facts established relating thereto were as follows:

1. That the private office of the defendant at Clauson's Inn was a constitutionally protected area.
2. "That the government agent Davis on October 24, 1961 solicited and obtained permission to enter into the defendant's private office, where the defendant conducted his business affairs in private . . . ." (Defendant's position, R. 137).

   Agent Davis testified: That on October 24, 1961 he stated to the defendant that he desired to go with the defendant into his private office, and went there pursuant to said request (R. 140).
3. That Agent Davis "obtained this permission by misrepresentation of the status of his entry" (position of defendant R. 137), and "that on October 21, 1961—that the said agent had come to the said premises and had agreed with the defendant to return at a later date, namely, either Monday or Tuesday, which would be October 23 or October 24, 1961 on his own time to prepare 720 Forms for cabaret taxes actually due the government by the defendant—" (position of defendant R. 138). "That the acts and circumstances by which the agent gained entry into the private office on October 24, 1961 as it related to the arrangement agreed upon for his coming, were in effect a misrepresentation" (position of defendant R. 138).

   These positions taken by the defendant were established as fact on the evidence.

   (a) Agent Davis unequivocally stated in his testimony upon inquiry by the Court calling for precise statement: "What I agreed to was to return to the premises so that he (the defendant) could

file a return, if due." (Statement supra #5, Record 51.)

(b) Reference is further made to the Statement, supra, #7 and #8, with record citations establishing that Agent Davis entered the Defendant's private office on October 24, 1961 pursuant to the planned operation of government agents for entrapment of the petitioner. It is submitted that the foregoing acts and circumstances set out in the Statement established entry by the agent into the private office by misrepresentation.

At the conclusion of the hearing on the Motion to Suppress the Trial Court stated the issue and the basis of his denial of the Motion as follows:

"The Court: Well, it is perfectly clear that your theory is that the individual was admitted under a deceptive statement and, therefore, everything that was taken within the inner office was taken as a result of admission by deception.

Mr. Davis: That is right, sir.

The Court: So it applies to notes on a piece of paper as well as notations upon a wire recorder.

Mr. Davis: Well, if the paper—there might be a different state of facts on a piece of paper. If it was open and obvious that that was being done, that would be one thing, and I think probably distinguishable from an electronic device, which is secret.

The Court: Well, I understand the argument you make. It seems to me a distinction without a difference. The petition and motion are denied."

The Trial Court reiterated its position on this matter in its Charge to the Jury (R. 136).

It is submitted that the Court's statement that the obtaining of the Minifon, Government Exhibit 6, was no different than if the agent took private notes after entrance into the private office (R. 136, 164, 165), is not sound. The Minifon is no different than if another agent were in the office by stealth with the powers of a Minifon.

However, the real ground of objection is that in light of the *Silverman* case, all evidence of the conversation of the agent and the defendant of the meeting of October 24, 1961 in the private office, whether in the form of testimony of the agent or as recorded in the Minifon, ought to be excluded as illegally obtained, in violation of the Fourth Amendment since the entrance to the office was gained by misrepresentation. Defendant's counsel in renewing his objection to the admission of this evidence at the trial stated this as his position. (R. 71)

That the Minifon recording and the testimony of Agent Davis of what occurred at the meeting at Clauson's Inn on October 24, 1961 constituted the government's case on Counts 2, 3 and 4 cannot be disputed. If the said recorded conversation and the testimony thereof of Agent Davis were excluded, the government's case on Counts 2, 3 and 4 would fail for lack of proof.

Whether the securing and taking out the evidence from the private office of the Defendant should be accomplished by Minifon on the person of Agent Davis, or transmission by Schmidt from his person, or by his personal faculties as such, each would be illegally obtained if entrance was gained by misrepresentation. In this respect a private office is on the same basis as a home. In effect it is a physical invasion of a constitutionally protected place as in *Silverman* v. *United States*, 365 U.S. 505, which distinguished and declined to reconsider the earlier cases of *Olmstead* v. *United States*, 277 U.S. 438, *Goldman* v. *United States*, 316 U.S. 129, *On Lee* v. *United States*, 343 U.S. 747.

In the *Silverman* case at the trial in the Federal District Court in which petitioners were convicted of gambling offenses under the District of Columbia Code, there was admitted in evidence over their objection testimony of police officers describing incriminating conversations engaged in by petitioners at their alleged gambling establishment, which the officers had overheard by means of an electronic listening device pushed through the party wall of an adjoining house until it touched heating ducts in the house occupied by the petitioners. The Supreme Court held that such testimony should not have been admitted in evidence and the convictions must be set aside as in violation of the Fourth Amendment. It was held that on the record of the case, the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment. *Goldman* v. *United States*, 316 U.S. 129, and *On Lee* v. *United States*, 343 U.S. 747, distinguished.

In the *On Lee* case the agent, not an officer or employee of the United States Government, was a "stool pigeon" who used an electronic device at quarters in a Chinese laundry open to the public, to tap the conversation to a United States agent outside the premises.

In *Goldman* v. *United States*, 316 U.S. 129, 62 S. Ct. 993, 86 L. Ed. 1322, it was held that the action of federal agents in placing a detectaphone on the outer wall of the defendant's hotel room and thereby overhearing conversations held within the room, did not violate the Fourth Amendment. There the agents had earlier committed a trespass in order to install a listening device within the room itself. Since the device failed to work the Court expressly reserved decision as to the effect on the search and seizure question of a trespass in that situation.

In the *Silverman* case the Court said as follows:

> "But in both Goldman and On Lee the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In Goldman there had in fact been a prior physical entry into the petitioner's office for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U.S. at 134-135. And in *On Lee*, as the Court said, '. . . no trespass was committed.' The agent went into the petitioner's place of business 'with the consent, if not by the implied invitation, of the petitioner.' 343 U.S. at 751-752.
>
> The absence of a physical invasion of the petitioners' premises was also a vital factor in the Court's decision in *Olmstead* v. *United States*, 277 U.S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that '(t)he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '(t)he intervening wires are not part of (the defendant's) house or office any more than are the highways along which they are stretched.' 277 U.S., at 465. Here, by contrast, by officers overheard the petitioners' conversations only by usurping part

of the petitioners' *house or office*—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. See *Jones* v. *United States*, 362 U.S. 257, 266; *On Lee* v. *United States*, supra, at 752; *Hester* v. *United States*, 265 U.S. 57; *United States* v. *Jeffers*, 342 U.S. 48, 51; *McDonald* v. *United States*, 335 U.S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-630. *This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.* (Italics supplied)

A distinction between the detectaphone employed in Goldman and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was 'unwilling to believe that the respective rights are to be measured in fractions of inches'. But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court

> said long ago bears repeating now: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' Boyd v. United States, 116 U.S. 616, 635. We find no occasion to re-examine Goldman here, but we decline to go beyond it, by even a fraction of an inch."

In the concurring opinion in *Silverman*, Mr. Justice Douglas said: "My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman* v. *United States*, 316 U.S. 129, while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of 'an unauthorized physical penetration into the premises,' on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate. I stated my views in *On Lee* v. *United States*, 343 U.S. 747, and adhere to them. Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded."

The Defendant argues that the premise in the above cases was unlawful penetration or intrusion into a constitutionally protected area.

But here there was physical invasion into the premises by misrepresentation. This would not differ from entrance by stealth without permission. *Gouled* v. *U. S.*, 255 U.S. 298. Such an entrenching by misrepresentation into the office of the Defendant by the federal agent it is submitted would prohibit as evidence "what was seen or heard" (Silverman v. U. S., supra), and the recording of the same on the Minifon, at the meeting of October 24, 1961, under the Fourth Amendment, by application of *Gouled* to the principles adjudicated in *Silverman*.

In *Lanza* v. *State of New York*, 82 Supreme Court Reporter, No. 16, 1218 at 1220, respecting the prohibition of such evidence, in relation to a constitutionally-protected area, the Court stated in the majority opinion, that there was no doubt "that surreptitious electronic eavesdropping under certain circumstances may amount to an unreasonable search or seizure". Mr. Justice Stewart, speaking for the majority, said: "And as recently as last Term we specifically held that electronic eavesdropping by federal officers, accomplished by physical intrusion into the wall of a house, violated the Fourth Amendment rights of the occupants. *Silverman* v. *United States*, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734."

In *Lanza*, Mr. Justice Stewart further said (P. 1220, 1221): "To be sure the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person's 'house' and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab." Copious citation of authorities were made by the Court supporting this statement of law.

Mr. Justice Stewart, in *Lanza*, further said with respect to an area immunized by the Constitution: " . . . the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection."

The government agent Davis gained entrance to the office of the Defendant on the precise agreement to transact clearly defined legal government business with the Defendant, and his presence there represented to the Defendant this status. On the facts, the conversion of the status to the planned operation to entrap was a misrepresentation of his status. His entrenching himself under this deception with a Minifon on his person, it is submitted, was the invasion of a constitutionally protected area by stealth with physical powers in reality more powerful than if an additional government agent were upon the premises by stealth in concert with Agent Davis, to procure evidence as to "what was said and done". The attack upon the Defendant's mind in the operation to entrap, as disclosed above by the lies and the strategem of fabricated tax obligations, even if the same were not within the strictures of illegal entrapment, was an invasion of the person of the Defendant; and it is contended that such an invasion of privacy and personal security in its connection with the other facts violated the rights of the Defendant under the Fourth Amendment. If the entrapment was illegal in the circumstances above stated, the violation of constitutional rights under the Fourth Amendment seems manifest.

Cf. Mr. Justice Frankfurter whom Mr. Justice Burton joins, dissenting in *Irvine* v. *California*, 347 U.S. 128 at 142, 143: "Mere failure to have an appropriate warrant for arrest or search, *without aggravating circumstances of misconduct in obtaining evidence*, (italics supplied) invalidates a federal conviction helped by such an unreasonable search and seizure. Such was the conclusion placed

upon the Fourth Amendment by *Weeks* v. *United States*, 232 U.S. 383."

In the exclusionary rule in *Weeks* v. *United States*, 232 U.S. 383 (1914), the Court stated that: "the Fourth Amendment . . . put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints (and) . . . forever secured(d) the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws." At pp. 391-39.

It is submitted that the foundation of constitutional rights under the Fourth Amendment, uniformly adhered to by this Court,[6] was stated in *Gouled* v. *United States*, 255 U.S. 298, 303-304: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U.S. 616, *Weeks* v. *United States*, 232 U.S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the

[6] Mr. Justice Frankfurter, dissenting in *U.S.* v. *Rabinowitz*, 339 U.S. 56 at page 74 said, "The guiding line in dealing with the Fourth Amendment was set forth in *Gouled* v. *United States*, 255 U.S. 298, 303-304," referrable to the foregoing statement.

right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."[7]

Mr. Justice Black stated in *Mapp* v. *Ohio*, supra, at page 662, 663:

> "The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem, has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*. There the Court fully discussed this relationship and declared itself 'unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.' It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the Wolf case. And, although I rejected the argument at that time, its force has, for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it

---

[7] Reference is made to *Mapp* v. *Ohio*, 367 U.S. 643, which overruled *Wolf* v. *Colorado*, 338 U.S. 25, limiting its *Judgment* thereto. The basic rationale of Justices Clark and Douglas that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, that of Mr. Justice Black who did not accept this view and concurred with the majority, on the premise that the end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth, and that of Justices Harlan, Frankfurter and Whittaker, who did not accept the view that the Weeks exclusionary rule derives from the Fourth Amendment itself, it is submitted, accord with the constitutional foundation as stated in *Gouled* above.

seems to me that the Boyd doctrine, though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the Boyd case:

> 'Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.' "

In *Boyd* v. *United States*, 116 U.S. 626, Judge Bradley held that the principles announced in the case of *Entick* v. *Carrington* applied "to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life."

In *Adams* v. *United States*, 192 U.S. 585, Mr. Justice Day said:

> "The security intended to be guaranteed by the 4th amendment against wrongful search and seizures is designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home of the citizen by officers of the law, acting under legislative or judicial sanction, and

to give remedy against such usurpations when attempted."

In *Bram* v. *United States*, 168 U.S. 532, this Court, in speaking of the construction given the Fourth and Fifth Amendments in the Boyd case said:

> "It was in that case demonstrated that both of these Amendments contemplated, perpetuating in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change."

In *Gouled* v. *United States*, 255 U.S. 298 at page 305, the first question certified to the Court for answer was "Is the secret taking or abstraction, without force, by a representative of any branch or subdivision of the Government of the United States, of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person,—a violation of the 4th amendment?"

Relevant thereto the Court stated at pages 305 and 306:

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a

reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the Government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment, and therefore the answer to the first question must be in the affirmative."[8]

---

[8] Cf. *United States* v. *Lipshitz*, 132 Fed. Sup. 519, U.S. Dis. Ct. E.D. N.Y. 1955 — An Internal Revenue Agent, Obst, engaged in making a routine civil audit of taxpayer's records was joined in investigation by Special Agent, Potts, Special Intelligence Unit, on June 30, 1948. The criminal investigation was initiated by the Special Intelligence Unit "and was not ordered as a result of a Revenue Agent's report of fraud disclosed by an audit of the taxpayer's books and return". (P. 521).

In the Court's finding on a Motion to Suppress, the Court said (523): "I am satisfied that from June 30, 1948, the day Potts was assigned to the case, he together with Obst, were jointly engaged in the preparation of the case for the criminal prosecution of the defendant, and that they did not inform him, nor did he know, that they were so engaged. Pott's assignment of Obst, a Revenue Agent, to obtain, without the Defendant's knowledge and consent, extensive information and extracts from the taxpayer's books and records, far in excess of those required for the customary routine audit of a Revenue

It is submitted that the application of the *Gouled* and *Silverman* cases to Question III in the Petition For Certiorari compels an answer in the affirmative.

Your petitioner replies to the brief of the Government filed in the Circuit Court below which calls upon the defendant to distinguish *Todisco* v. *United States*, 298 F.2d 208, cert. den. 368 U.S. 984 and *United States* v. *Kabot*, 295 F.2d, 848, cert. den. 369 U.S. 803. (Government's brief, page 12, last paragraph.)

In the *Todisco* case a lawyer was indicted and found guilty of offering a bribe to settle a tax case of a client. There were a number of conversations taped and transmitted to recipients outside by a device on the government agent from the office of the defendant, all relating to conversations of a proposed bribe of $500.00. It was held not a violation of the defendant's rights under the Fourth Amendment.

It seems obvious that the agent in the instant case on the facts was in the office of the defendant by misrepresenta-

---

Agent, cannot be appreciably distinguished from the obtainment thereof by stealth or subterfuge.

"It is difficult to ascertain precisely how much of what Obst learned during his frequent and extensive examinations of the taxpayer's records was used in the preparation of the case for criminal prosecution and the resultant indictment, but there is little doubt that the first, and considerable subsequent information relating to the three aforementioned South African accounts came from that source. It is my opinion, therefore, that the evidence relating to those accounts was obtained in violation of the defendant's rights under the 4th and 5th Amendments of the Constitution of the United States. If we are to give effect to those rights, we can do not less than to render useless the information and evidence so obtained. In *Boyd* v. *United States*, 116 U.S. 616, at page 635, 6 S. Ct. 524, at page 535, 29 L.Ed. 746, a substantially analogous case, involving compulsorily produced private books and papers, the Court said, 'Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose . . .'"

The Court granted the Motion to Suppress all the evidence relating to "the three aforementioned South African concerns" which was illegally obtained.

tion, as distinguished from the *Todisco* case embracing invited visits by the defendant in that case relevant to the object of the bribe. Manifestly in *Todisco* the evidence supported that the defendant was pursuing a criminal design which he had already conceived, whereas in the instant case this could not be found to be so.

The entrenching of a government agent in the office of the defendant, a constitutionally protected area, by misrepresentation and for the purpose of illegal entrapment seems clearly an invasion of privacy of the defendant under the Fourth Amendment. In the *Todisco* case there was no invasion of privacy whatsoever in legal contemplation.

The Court in *Todisco* refers to an article in a law review which assimilates a device such as a Minifon with that of taking notes. As stated above, the learned Court in this case adopted such a view as expressed in his dealing with the Motion to Suppress and in his Charge to the Jury. It seems apparent that where the entrance is gained by misrepresentation into a private office, it is more the Trojan horse than a note-taking matter. It is submitted, it goes to the very essence of the rights under the constitutionally protected area of the Fourth Amendment.

In *United States* v. *Kabot*, supra, an accountant was indicted and found guilty of offering and giving a bribe to a government agent to settle an income tax case of a taxpayer he was representing. The agent went to the office of the defendant with a minifon attached to his person to cover a situation indicating the offering of a bribe by the accountant, recorded a conversation concerning the subject matter, with explicit instructions not to lead the defendant on. Also a device was planted in the agent's hotel room to record and transmit to agents outside, the occurrences covering the same matter. This was clearly not the obtaining of entrance by the Agent into the office by misrepresentation, and there was absent any evidence as to

illegal entrapment. Again, as in *Todisco*, this is distinguishable from the instant case.

Conclusion

For the foregoing reasons, the petitioner urges that the judgment of the Court should be reversed and the case remanded to the District Court to enter judgment of acquittal as to the petitioner on Counts 2, 3 and 4 of the indictment.

Respectfully submitted

EDWARD J. DAVIS
11 Pemberton Square
Boston, Mass.
Attorney for Petitioner

GERALD F. MULDOON
10 State Street
Boston, Mass.
Of Counsel

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute and rules involved	2
Statement	4
A. The evidence	5
B. The instructions	13
Summary of argument	17
Argument:	
I. No reversible error was committed in the handling of the question of entrapment	19
A. Petitioner was not entitled to a judgment of acquittal on the claim of entrapment	20
1. The acquittal on count 1 does not require that the evidence of an unsolicited bribe on October 21 be disregarded	21
2. The evidence does not support the claim of entrapment as a matter of law	22
B. Petitioner was not prejudiced by the trial court's instructions	28
1. The charge was not prejudicially erroneous	28
2. The trial court, in charging entrapment, gave petitioner more than was his due	30
II. The agent's testimony as to his conversation with petitioner on October 24, and the recording thereof, were properly admitted into evidence	32
A. The use of the recording device was, under the circumstances, unobjectionable	33

670611—62——1

Argument—Continued
B. There was no invasion of the privacy of petitioner's office ..... Page 36
C. There was no other invasion of petitioner's privacy 38
D. There was no improper law enforcement activity 39
Conclusion 41

CITATIONS

Cases:

Anspach v. *United States*, 305 F. 2d 48, certiorari denied, 371 U.S. 826 33
Archambault v. *United States*, 224 F. 2d 925 40
Bruno v. *United States*, 254 F. 2d 8 31
Carnes v. *United States*, 295 F. 2d 598, certiorari denied, 369 U.S. 861 ..... 33, 34
Cellino v. *United States*, 276 F. 2d 941 32
Chapman v. *United States*, 271 F. 2d 593 29
Conway v. *United States*, 142 F. 2d 202 31
Corbin v. *United States*, 253 F. 2d 646 28
Coronado v. *United States*, 266 F. 2d 719 27
Costello v. *United States*, 252 F. 2d 750 31
Costner v. *United States*, 271 F. 2d 261, certiorari denied, 362 U.S. 952 28
Crisp v. *United States*, 262 F. 2d 68 27
Dailey v. *United States*, 261 F. 2d 870, certiorari denied, 359 U.S. 969 41
Demos v. *United States*, 205 F. 2d 596, certiorari denied, 346 U.S. 873 29
De Marco v. *United States*, 296 Fed. 667, certiorari denied, 265 U.S. 593 29
Dunn v. *United States*, 284 U.S. 390 22
Eastman v. *United States*, 212 F. 2d 320 27
Ege v. *United States*, 242 F. 2d 879 28
Goldman v. *United States*, 316 U.S. 129 35
Gouled v. *United States*, 255 U.S. 298 38
Greatreaks v. *United States*, 211 F. 2d 674 31
Grimm v. *United States*, 156 U.S. 604 40
Hansford v. *United States*, 303 F. 2d 219 27
Jones v. *United States*, 290 F. 2d 671, certiorari denied, 368 U.S. 858 28

Cases—Continued

	Page
Kivette v. *United States*, 230 F. 2d 749, certiorari denied, 355 U.S. 935	40
Landers v. *United States*, 304 F. 2d 577	30
McGuire v. *United States*, 273 U.S. 95	37
Marks v. *United States*, 260 F. 2d 377, certiorari denied, 358 U.S. 929	29
Martinez v. *United States*, 300 F. 2d 9	29, 32
Moore v. *United States*, 262 F. 2d 216, certiorari denied, 359 U.S. 959	27, 32
Murray v. *United States*, 250 F. 2d 489, certiorari denied, 357 U.S. 932	31
Olmstead v. *United States*, 277 U.S. 438	35, 40
On Lee v. *United States*, 343 U.S. 747	19, 32, 36, 37
Picciurro v. *United States*, 250 F. 2d 585	28
Ramirez v. *United States*, 294 F. 2d 277	27
Rathbun v. *United States*, 355 U.S. 107	39
Rodriguez v. *United States*, 227 F. 2d 912	27, 31
Ryles v. *United States*, 183 F. 2d 944, certiorari denied, 340 U.S. 877	30
Sherman v. *United States*, 356 U.S. 369	18, 25, 28, 29, 40
Sherman v. *United States*, 200 F. 2d 880	29
Siglar v. *United States*, 208 F. 2d 865, certiorari denied, 347 U.S. 991	27
Silverman v. *United States*, 365 U.S. 505	33, 38
Sorrells v. *United States*, 287 U.S. 435	18, 25, 28, 40
Stein v. *United States*, 166 F. 2d 851, certiorari denied, 334 U.S. 844	41
Stein v. *United States*, 263 F. 2d 579	27
Todisco v. *United States*, 298 F. 2d 208, certiorari denied, 368 U.S. 989	33, 35
Tudor v. *United States*, 142 F. 2d 206	31
United States v. *DeMarie*, 226 F. 2d 783, certiorari denied, 350 U.S. 966	32
United States v. *Finazzo*, 288 F. 2d 175, certiorari denied, 368 U.S. 837	33
United States v. *Gironda*, 267 F. 2d 312, certiorari denied, 361 U.S. 848	30
United States v. *Kabot*, 295 F. 2d 848, certiorari denied, 369 U.S. 803	24, 33
United States v. *Klein*, 108 F. 2d 458	31
United States v. *Landry*, 257 F. 2d 425	30

Cases—Continued Page

United States v. *Lile*, 290 F. 2d 225 30
United States v. *Masciale*, 236 F. 2d 601, affirmed, 356 U.S. 386 30
United States v. *Place*, 263 F. 2d 627, certiorari denied, 360 U.S. 920 31
United States v. *Rabinowitz*, 339 U.S. 56 40
United States v. *Spadafora*, 181 F. 2d 957, certiorari denied, 340 U.S. 897 41
United States v. *Waldin*, 253 F. 2d 551, certiorari denied, 356 U.S. 973 31
United States v. *White*, 223 F. 2d 674, certiorari denied, 350 U.S. 888 31
Walker v. *United States*, 285 F. 2d 52 32
Ware v. *United States*, 259 F. 2d 442 27
Weathers v. *United States*, 126 F. 2d 118, certiorari denied, 316 U.S. 681 41

Constitution, statute and rules:

Constitution of the United States:
Fourth Amendment 19, 32, 33, 34
Fifth Amendment 39
18 U.S.C. 201 ..... 2, 4
Federal Rules of Criminal Procedure:
Rule 29(a) 3, 28
Rule 30 ..... 3, 31
Rule 52 ..... 4, 20

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 236

GERMAN S. LOPEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the court of appeals (R. 182–183) is reported at 305 F. 2d 825.

JURISDICTION

The judgment of of the court of appeals was entered on June 15, 1962 (R. 183). The petition for a writ of certiorari was filed on July 7, 1962, and was granted on October 15, 1962 (R. 184; 371 U.S. 859). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there is a genuine issue of entrapment in this case where the evidence did not suggest the defense, petitioner did not seek a judgment of acquit-

tal on that ground, did not request instructions on the issue and did not except to the instructions actually given by the trial court.

2. Whether, after an initial attempt at bribery by petitioner, the Revenue agent's listening with feigned acquiescence to a second bribe offer in petitioner's office, and secretly recording it, violated any right of privacy, so as to require exclusion of the agent's testimony reciting the conversation and the contemporaneous recordings.

STATUTE AND RULES INVOLVED

Section 201 of Title 18 U.S.C. provides as follows:

> Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or

omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

Federal Rules of Criminal Procedure:

Rule 29(a) provides in pertinent part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52 provides:

(a) Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

On November 8, 1961, a four-count indictment was returned against petitioner in the United States District Court for the District of Massachusetts charging him with attempted bribery of an Internal Revenue agent, in violation of 18 U.S.C. 201 (*supra*, p. 2). Count one charged that, on or about October 21, 1961, at North Falmouth, Massachusetts, petitioner gave $420 to Roger S. Davis, an Internal Revenue Agent, with intent to induce Davis to refrain from making an examination of books and records relating to the sales and receipts of the bar and lounge at Clauson's Inn for the years 1959–1961 and from computing the cabaret tax on such sales and receipts; count 2 charged that, on or about October 24, 1961, petitioner gave Davis $200 with the intent to influence him to aid in concealing from the Internal Revenue Service the sales and receipts at Clauson's Inn and any cabaret tax due for the years 1959–1961. Counts 3 and 4 charged that on October 24, 1961, petitioner promised Davis $200 and an expense-paid weekend for himself and his family at Clauson's Inn for the same purpose

(R. 2–5). Following a jury trial, petitioner was convicted on counts 2, 3 and 4 (R. 137), and was sentenced to imprisonment for a period of one year (R. 6–7). The court of appeals unanimously affirmed his conviction (R. 182–183; 305 F. 2d 825).

A. THE EVIDENCE

The evidence adduced at trial, and on the motion to suppress,[1] may be summarized as follows:

1. In late August 1961, Internal Revenue Agent Roger S. Davis was assigned to the Cape Cod area for various duties, including the investigation of possible evasion of excise taxes (R. 62). On August 31, about noon, Davis visited Clauson's Inn at North Falmouth, Massachusetts (R. 170), which petitioner operated under a lease (R. 12). Davis asked petitioner whether there was dancing, singing or other entertainment at the Inn during the evening hours. Petitioner replied there was none (R. 9, 170). When Davis showed petitioner an advertisement in the Cape Cod Guide for August 26, 1961, which listed "dinner, dancing and entertainment" for Clauson's Inn, petitioner said he was not responsible for this advertisement and knew nothing about it (Gov. Ex. 1; R. 9–10, 26–27, 171–172). After looking over the premises, Davis left (R. 10, 171). He returned that same evening and observed dancing in the bar and lounge. He did not speak to petitioner on this occasion, having been told that petitioner was not at the Inn (R. 10, 29–30, 126, 171–172). The following day the agent submitted a

[1] Prior to trial, petitioner filed a motion to suppress as evidence a recording of a conversation between himself and agent Davis which was held in petitioner's office at Clauson's Inn

report to his group supervisor as follows: "Subject: Cabaret surveillance, August 31, 1961. 1. Clauson's Inn, potential delinquent, North Falmouth, bar and lounge. Trio plays six nights. Jazz concert Sundays. When Trio plays there is some dancing although management claims that it does not allow such dancing. Will follow up" (R. 11; Gov. Ex. 2).

2. On the evening of October 21, 1961, Davis returned to Clauson's and saw patrons in the bar and lounge dancing to the music of a trio and heard a waitress sing one song. He then met petitioner who informed him that he operated the bar and lounge under a lease; that the trio played Friday and Saturday nights; that there was a piano player on Tuesday, Wednesday and Thursday nights; and that the juke box was used when the band was having a break. Davis expressed the opinion that the premises would be liable for a cabaret tax because of the dancing and asked to examine the books. Petitioner stated that his books were at the Inn, but that he wished to avoid any "inconvenience" from an examination of records (R. 11–12, 173–174).

Petitioner suggested that they go into his office, where the discussion was continued. The agent said that if a tax were due there would also be a penalty

---

on October 24, 1961 (R. 5–6). After a hearing, Judge Wyzanski denied this motion (R. 165). At trial, the motion was renewed and again denied (R. 70–74).

Pertinent excerpts from the hearing on the motion to suppress are contained at record pp. 137–165, 170–182. For the convenience of the Court, the original transcript of the hearing has been lodged with the Clerk as has the original trial transcript.

for non-filing. Petitioner stated that he wished to avoid "this aggravation" and asked if they could not reach some sort of an "agreement." Davis said that they could not, that he "had a job to do," and that he would come back some time the following week so that petitioner could file a prompt return for the current quarter (ending October 31) to avoid a penalty (R. 13). Petitioner said that he did not want "to insult" Davis, but asked if the agent could not drop the case if he wanted to. Davis said that he could not and that he had filed a report following his earlier visit (*ibid.*). A few moments later, petitioner again stated that he did not wish "to insult" the agent and did not know whether to take him into "his confidence" (R. 13). Davis did not reply. At this point, petitioner opened his safe and laid some money on the desk near where the agent was sitting, with the comment: "You can drop this case. Here's $200. Buy your wife a present. And I'll have more money for you at Christmas time. This is all I have now" (R. 13–14). Davis told him "to take the money back" (R. 14). Petitioner urged Davis to take it, adding that he should bring his wife and family "down here for a week as my guest and stay at Clauson's Inn. Relax and play golf." Again Davis replied that he "had a job to do" and made some inquiries about the financial aspect of the business. Based upon petitioner's figures, Davis tentatively expressed the view that the tax for a year would amount to $3,000 (R. 14). Petitioner then added more bills to the money on the desk, stating that he did not wish to be bothered filing returns for

past years but that he would file a return for the current quarter (R. 14–15). After some further conversation—Davis repeating that he did not want the funds and petitioner angrily insisting that he take the money—the agent took the money, which now amounted to $420, and left the premises. This was about 10 p.m. Before Davis left, petitioner again told him that he would file a return for the current quarter and said that Davis should return the following Tuesday (October 24) before 12:30 p.m. (R. 14–15).

3. Davis immediately drove to another establishment in the area and placed a telephone call to the District Director's office in Boston. Upon receiving no response, Davis called a fellow agent and told him what had transpired. The agent told Davis to remain where he was and that he would have the group supervisor call Davis. At about 10:30 p.m., Davis received a telephone call from his group supervisor and recounted the incident to him (R. 15).[2] On the morning of Monday, October 23, Davis turned over the $420 to the Regional Inspector and furnished him with a sworn statement as to the events of October 21 (R. 16, 65–66, 95–97).

4. On the evening of October 23, Davis returned to Falmouth in the company of four Internal Revenue Inspectors (R. 16, 66). The next morning he was directed by the inspectors to return to Clauson's and keep his appointment with petitioner (see *supra*), to "pretend to play along with the scheme" and

[2] The other agent and the group supervisor testified at trial in corroboration of these telephone calls (R. 63–65).

to try to draw the conversation back to the events of October 21, including reference to the money already paid by petitioner (R. 17, 67, 151). Davis was searched by one of the inspectors and the amount of money he had was determined (R. 17, 68). Two electronic devices were then placed on his person. One was a Schmidt battery-operated radio transmitter, which was intended to transmit any conversation with petitioner to the inspectors who would be waiting outside the premises. This instrument failed to work (R. 17, 56, 67, 140–144). The second device was a "Minifon," a self-contained recording unit, which did not broadcast or transmit as it recorded (R. 17, 56, 67, 142–144).[3]

At the appointed time, Davis met petitioner at Clauson's Inn, and petitioner invited him to have lunch. The agent declined and suggested that they go into petitioner's office and talk (R. 17). Once inside the office, Davis removed from his brief case a blank form 720, federal excise tax return, and explained it to petitioner (R. 17–18). Petitioner said that he had never thought it necessary to file a return, that he wanted to take Davis into his confidence and that the agent should advise him if anything came up (R. 18). The agent then questioned petitioner about his receipts, which petitioner said totaled $160,000 per year. After a series of computations, Davis told him that the tax due would be over

[3] The "Minifon" was described as "a battery-operated wire recorder, in which a wire spool is placed, which will record conversation from 30 minutes to four hours, depending on the length of the spool" (R. 67).

$15,000 (R. 18–19).[4] Petitioner then said that he had something for the agent and handed him four fifty dollar bills. Petitioner added that he would have more money for Davis the following month (R. 19). In response to an inquiry from Davis, petitioner mentioned that he had given him $420 the previous Saturday night (October 21) (R. 19). When Davis asked what petitioner wanted in return for the funds, petitioner responded that he wanted to get by without filing a tax return until Davis advised him that the pressure in Davis' office made filing a current return necessary (R. 20). Petitioner asked Davis whether it would be a good idea to put up a no-dancing sign "to make it look good" (*ibid.*). The agent replied that he "couldn't suggest anything" (R. 20). When Davis said he might bring his wife down to the Inn petitioner told him to do so for a weekend as his guest (R. 21). He said that he would have another $200 for Davis the coming month (R. 21).

Following this interview, Davis met with the four inspectors who removed the electronic devices from his person. They also searched him and found four fifty-dollar bills (R. 23, 68–89; Gov. Ex. 5). That same day, Davis listened to a playback of the recording (R. 24, 69), and testified at the trial that it was accurate(R. 24). The recording of the conversation was played for the jury over defense counsel's objection (previously made on the motion to suppress) that it was inadmissible under the Fourth Amend-

[4] The agent stated that he made several errors in his computations "due to nervousness" (R. 19).

ment as the fruit of a fraudulent entry into petitioner's private office (R. 70–78). This recording corroborated Davis's account of the conversation in detail (R. 80–94).

5. Petitioner testified in his own behalf. He stated that he had commenced operating the lounge and restaurant at Clauson's Inn in March 1959 (R. 102); that a no-dancing sign had been in the lounge for nearly three years and was there on August 31, 1961;[5] and that when he spoke to agent Davis on the early afternoon of August 31, petitioner advised Davis that he (petitioner) was not required to file a cabaret tax since there was no entertainment at Clauson's (R. 103–104). That evening, petitioner stated, he saw Davis on the premises but did not talk to him. Petitioner further testified that on October 17, there had been a change of policy at the Inn which resulted in a switch to entertainment, including dancing and singing (R. 102). When Devis returned on October 21, petitioner reported this change and said he expected to file returns from that point on (R. 108, 155). Davis then asked petitioner about his rental arrangement with Clauson's and the amount of business he did (R. 108–109, 155–156). When Davis asked to inspect the books, saying that there was a cabaret tax due, petitioner responded that the books were in order, and denied that he owed any past cabaret taxes (R. 109–110, 156–157). According to petitioner, Davis then stated that if he were to examine petitioner's books, he would find that "ten to fifteen thousand dollars in

[5] Agent Davis had denied having seen any such sign at the premises (R. 30).

cabaret tax" was owing (R. 110, 156). Petitioner denied the liability (*ibid.*). Davis then stated that he would like to spend a weekend at the resort with his wife (R. 157). Petitioner responded: "Please do. Be my guest." (R. 110, 158). At this point petitioner said he asked Davis if he would be willing to prepare and file his cabaret tax when it came due, on his own time, and Davis answered, "that all depends" (R. 111, 158). Petitioner then removed $200 from his pocket and added another $100 from the safe, and offered it to the agent (*ibid.*). Petitioner testified that Davis said this amount was not enough, he could not jeopardize his position for that sum. According to petitioner, he told Davis that he was not asking him to jeopardize his position but merely to prepare his returns and to do whatever was necessary to get his books in proper order (R. 111–112, 114). When Davis replied that he could not waste time for that, petitioner got another $120 from the cashier, and told Davis he would have more money for him the next time he came down to help prepare his books. Davis said he would be back the following Monday or Tuesday (R. 112, 158–159).

As for the meeting on October 24, petitioner testified generally that Davis went into a lot of figures and petitioner became emotionally upset because he felt that Davis was not there for the purpose for which he had previously arranged to return (R. 112, 114–115). Petitioner also discussed the fact that his wife had been upset at his previous dealings with

Davis (R. 114, 116),[6] and that, after the agent left, he checked as to whether Davis was, in fact, an internal revenue agent (R. 116–117). Petitioner did not testify concerning the other aspects of his conversation with Davis on October 24, nor did he touch upon the accuracy of the wire recording of that conversation.

Petitioner's part-time bookkeeper, who testified as a defense witness, stated that he had made a journal entry on the books on October 18, 1961, pursuant to petitioner's instructions (R. 118–119), which read, "1961, October 16. Change in policy in entertainment. From this date liquor sales subject to cabaret tax during entertainment hours. The tax is to be deducted from beverage sales, which are subject to a rent charge" (R. 120; Def. Ex. D). He further testified that he had seen the no-dancing sign from time to time since petitioner had begun operating the bar and lounge (R. 118–119, 122).

B. THE INSTRUCTIONS

After instructing the jury that the defendant has the benefit of a presumption of innocence and that the government must establish "every essential element" of the crime beyond a reasonable doubt (R.

[6] Petitioner's wife testified that her husband had told her that he had taken $100 from the safe and $120 from the cashier, to pay an Internal Revenue agent who was going to file tax returns for him. She insisted that they should make up these funds from their own pockets, which they did. She further said that she and her husband argued continuously about the payment to Davis, but she did not call the Internal Revenue Service because of petitioner's opposition to such a procedure (R. 123–125).

670611—62——3

127), the court charged that the government's burden under the statute was as follows (R. 128–129):

> First, the government must prove that the defendant gave or promised something of value. Second, the government must prove beyond a reasonable doubt that the gift or promise was made to an officer or employee of the United States. Third, the government must prove beyond a reasonable doubt that the person to whom the offer or gift or promise or payment was made was acting in an official function. Fourth, the government must prove beyond a reasonable doubt that the defendant knew that the person was an officer, or agent, and was acting in his official capacity. And, fifth, the government must prove beyond a reasonable doubt that he did it with the necessary specific intent spelled out in the statute, that intent, speaking loosely, being to defraud or to induce a fraud upon the United States.

The court then called the jury's attention to the difference between the first count and the other three counts of the indictment, observing that petitioner's intent, as alleged under count one, was to induce agent Davis not to inspect his books which, the court said, was a narrower charge than that contained in the three other counts. The court invited the jury's close scrutiny as to whether, with respect to this charge, specific intent had been shown beyond a reasonable doubt (R. 130–132).[7]

[7] The court charged in this connection (R. 132): "Now are you persuaded beyond a reasonable doubt, that the defendant had that particular specific intent, to wit, to keep Davis from making an examination of the books and records, or, on the contrary, are you of the view that the defendant correctly testi-

On the question of entrapment the court instructed (R. 133–134):

> Now there are some other matters to which it is important that I should call to your attention, and one of them is a defense which was raised in argument by Mr. Davis, the lawyer, speaking on behalf of Mr. Lopez. It was his suggestion to you that in this case the defendant should not be convicted because he was entrapped. If I understood Mr. Davis' argument to you correctly, he suggested to you that Roger Davis, the Agent, proposed that he, Roger Davis, and his wife, might have the benefit of a free weekend or free golfing experience at Clauson's Inn, and that this was a method of soliciting a bribe and entrapping the defendant.
>
> Mr. Davis, the lawyer, also suggested to you that in making these computations so-called of a tax which might be due on account of a cabaret, if there were one, or on account of dancing, if there were, Agent Davis obviously, in Mr. Lawyer Davis' view prepared some inflated figures and was using this as a kind of bait for inducement to a bribe.[8]
>
> Now the law with respect to entrapment is this: if a government agent by improper means or overbearing persuasion or wrongful conduct

---

fied when he said that he made available all the books and records, and that he was willing to have them examined either on the premises or elsewhere?

"It is not up to me to say what I believe, but it is up to me to point very sharply to the particular language of this Indictment, and to invite your close scrutiny as to whether that particular, specific intent charged by the Grand Jury is indeed supported beyond a reasonable doubt."

[8] We have filed with the Clerk the transcript of counsel's closing argument to the jury.

induces a person of ordinary firmness to commit a crime which he would not otherwise commit, then under those circumstances, the defendant is to be acquitted, not because he did not do something wrongful but because he was induced to do a wrongful act which he would not otherwise have done.

Now needless to say in all types of law enforcement, particularly with respect to matters involving certain types of regulatory statutes, it is often difficult for the government to get evidence, and government agents may properly, and without violating the law, or their duty, take such steps as make it possible to procure evidence even though such steps involve their own participation, provided that their participation is not a deliberate temptation to men of ordinary firmness, provided that they do not cause a crime to be committed by someone who does not have a criminal disposition to commit that crime.

The burden of proof with respect to entrapment is on the defendant. And you are to ask yourself whether in fact on the evidence you heard you are persuaded by the preponderance of that evidence that Agent Davis, as it were, created the crime and the temptation, and he, Agent Davis, was the instigator and author of a crime that would never under any circumstances have taken place, had he not used unfair means.

Petitioner took no exceptions to the charge (R. 137). The jury acquitted on count 1 and found petitioner guilty on the remaining 3 counts (*ibid.*); see *supra*, pp. 4–5). Petitioner filed no motion for a judgment

of acquittal during the trial and no motion for a new trial, but did file a motion for judgment notwithstanding the verdict with respect to counts 2, 3 and 4 (R. 6).

SUMMARY OF ARGUMENT

I

A. Petitioner's argument that he was entitled to a judgment of acquittal on the ground of entrapment rests essentially upon the assumption that his acquittal on count 1 wiped the slate clean of the events of October 21 and that what occurred on October 24 must therefore be judged without regard to what had gone before. The premise is erroneous. Considering the limited scope of the first count, the jury verdict of acquittal did not imply rejection of the agent's testimony with respect to the unsolicited bribe offer of October 21. In any event, since there is no requirement that a jury verdict on various counts be consistent, the evidence relating to the events on that date need not be disregarded. Taking all the evidence together, there can be no doubt that petitioner was not entrapped.

Even if viewed in isolation, the events of October 24 do not make out a case of entrapment. The record of the conversation between petitioner and agent Davis on that date shows that the agent, by his remarks and responses to petitioner's statements, was not inducing or creating crime, but simply affording petitioner the freedom to commit a criminal act, if he so desired, in a way that would be susceptible of proof.

Petitioner's defense, denying commission of the crime, and his own testimony at trial, is inconsistent

with the belated claim of entrapment. The fact is that no such issue is revealed by the record. At least, having failed to present evidence on entrapment, requested no judgment of acquittal on that ground, offered no entrapment instruction and taken no exception to the instruction actually given by the court, petitioner is foreclosed from urging on appeal that he was entitled to acquittal as a matter of law on a defense of entrapment.

B. Petitioner was not prejudiced by the trial court's instructions on entrapment. The charge that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to *men of ordinary firmness*" (emphasis added) is in accord with the standards announced by this Court in *Sherman* v. *United States*, 356 U.S. 369, 372, 384, and *Sorrells* v. *United States*, 287, U.S. 435, 445.

The instruction that the burden of proof with respect to entrapment falls wholly on the defendant was, we concede, not a complete or a correct statement of the law. But it did not prejudice petitioner. In the present context, in the face of petitioner's denial of the crime and his failure to suggest governmental inducement, it would have been pure fiction for the trial court to instruct the jury that the government had the burden to show that the defendant was ready and willing to commit the offense. In submitting the question to the jury, the trial court gave petitioner more than his due. In any event, petitioner's claim of error, not plainly prejudicial, comes too late.

II

Agent Davis' testimony as to his conversation with petitioner on October 24 and the recording of that conversation (by Minifon) were properly admitted into evidence. In this respect, the case is governed by *On Lee* v. *United States*, 343 U.S. 747.

There was no violation of the Fourth Amendment guarantee against unreasonable intrusions on privacy. Entry into petitioner's office was not gained by illegal means. In any event, there was no violation of the privacy of that room. Under the circumstances, the locale was irrelevant.

Nor was there an impermissible eavesdropping on a private conversation. The attempt to bribe a public official, which the intended recipient proposes to divulge, is never a private communcation. The contemporaneous recording, which merely duplicated the agent's own mental record of the matter, does not affect the question.

The agent's conduct was not otherwise improper. It was in all respects permissible law enforcement activity.

ARGUMENT

I

NO REVERSIBLE ERROR WAS COMMITTED IN THE HANDLING OF THE QUESTION OF ENTRAPMENT

Although he made no motion for a judgment of acquittal on the ground of entrapment, made no request for an instruction on entrapment, and took no exception to the charge given, petitioner now claims (1) that the evidence establishes entrapment as a

matter of law and (2) that, in any event, the trial court's instructions on entrapment constitute such plain error as to require reversal under Rule 52 of the Federal Rules of Criminal Procedure (*supra*, p. 4). We first show that the claim of entrapment as a matter of law is utterly refuted by the facts of record. We then point out that, as the lateness of the claim itself suggests, entrapment was never a genuine issue in the case, and that submission of the question to the jury worked a gratuitous advantage in petitioner's favor, so that any error in the instructions cannot have prejudiced him.

A. PETITIONER WAS NOT ENTITLED TO A JUDGMENT OF ACQUITTAL ON THE CLAIM OF ENTRAPMENT

Petitioner's present argument that he was entitled to a judgment of acquittal on the defense of entrapment stems largely from a misconception of the effect of his acquittal on count 1. Petitioner makes two erroneous assumptions: (1) that, since he was acquitted on count 1 of the indictment, the government's evidence on that count must be wholly rejected, while his version of the events of October 21 must be accepted as true; and (2) that the case must be judged as though no bribe offer had been made by petitioner on October 21. On those assumptions petitioner argues that the government's activity on October 24—the use of the recording device and agent Davis' express readiness to "play along"—constituted improper conduct which amounted to entrapment. The fact is, however, that the acquittal on count 1 does not show that the jury rejected the evidence of petitioner's unsolicited offer of a bribe on that date. Nor

does Davis' conduct on October 24 suggest entrapment, even if judged in isolation.

1. The acquittal on count 1 does not require that the evidence of an unsolicited bribe on October 21 be disregarded.

Count 1 of the indictment differed from the other three counts in that it was more narrowly framed, charging that petitioner offered and gave a bribe with the specific intent to induce agent Davis to refrain from examining his books and records.[9] Counts 2, 3 and 4 were more broadly based, alleging that petitioner's criminal intent was to obtain the agent's help in concealing the sales and receipts at Clauson's and any cabaret tax due for the operation of the bar and lounge (R. 2–5). The trial judge made pointed reference to this distinction in his instructions, strongly intimating that the government had failed to establish beyond a reasonable doubt the specific intent alleged in count 1, in view of petitioner's testimony that he had made available his books and records and was willing to have them examined (R. 132). The court stressed petitioner's testimony in this regard and observed that it was his duty "to point very sharply" to the language of count 1 and "to invite [the jury's] close scrutiny as to whether that particular, specific intent charge[d] by the Grand Jury is indeed sup-

[9] Following the literal language of the indictment (R. 2–3), the count might be read more broadly as charging an intent to induce the agent to refrain from "computing" the tax and "reporting" the liability independently of an examination of the taxpayer's books. But the trial judge clearly did not so read it, and the jury was, of course, bound by his interpretation of the charge.

ported beyond a reasonable doubt" (R. 132, see also R. 130–131). The court, in short, invited, indeed, almost directed, a judgment of acquittal on count 1.

In these circumstances, the jury may have acquitted under Count 1, even though it fully believed the government's evidence that petitioner had given some, and promised additional, money to Davis on October 21, because it concluded that the government had not shown the requisite intent required to convict under that count. In other words, the jury could well have believed that an unsolicited bribe had been offered on that date, but for a different purpose than was charged in Count 1, *i.e.*, that it was offered not to induce Davis to refrain from examining the books, but to secure his help in cancelling possible tax liabilities.

In any event, there is no requirement that a jury verdict on various counts be consistent. *Dunn* v. *United States*, 284 U.S. 390, 393–394. Whatever the jury concluded as to the transaction of October 21, we need not disregard evidence of what transpired on that day if it is relevant to the remaining charges. Its importance in showing petitioner's predisposition to attempted bribery is self-evident. Nothing that occurred on October 24 could change the basic fact that petitioner had already, three days earlier, betrayed his purpose to solve his tax problems by offering a bribe to the investigating agent.

2. The evidence does not support the claim of entrapment as a matter of law.

(a) As to the events of October 21, Agent Davis' testimony was unequivocal. Neither directly, nor by inference, did he ask for, or suggest a bribe. On the

contrary, the agent's testimony was that petitioner pressed a bribe upon him and insisted that he take it after the agent had told him to put the money back. And petitioner's version of the events of October 21, even if accepted as true, does not show entrapment. According to petitioner, he himself informed Davis of a change in the Inn's policy as of October 17, which would require the payment of taxes thereafter, and upon his own initiative and without any inducement by the agent, he invited the agent to assist him in the preparation of his books and tax returns, paying Davis $420 for this purpose alone (R. 107–112).

Petitioner did testify that during their conversation the agent stated that he would like to spend a weekend at Clauson's (R. 110–111). The trial judge understood petitioner's counsel to have suggested to the jury in closing argument that this amounted to the solicitation of a bribe and an entrapment of the defendant (R. 133). The judge's charge was largely a response to this argument (see *supra*, p. 15). But petitioner's claim (which Davis emphatically denied (R. 44)) does not show entrapment as a matter of law. Nor does it suggest a factual issue of entrapment in the present context. A suggestion by the agent that he would like a free weekend (even if it had been made) could not have implanted in the mind of the defendant the idea that he should pay $420 for alleged services. Moreover, solicitation of a personal gift by a government official is extortion, not illegal entrapment. "Entrapment involves the action of overzealous government agents acting for the government inciting an innocent man to crime.

Extortion on the other hand, is based on conduct by dishonest employees attempting action against the government." *United States* v. *Kabot*, 295 F. 2d 848, 854 (C.A. 2), certiorari denied, 369 U.S. 803. But, in any event, petitioner himself never testified that the suggestion of the free weekend led him to offer and pay money to Davis. According to petitioner's trial testimony, he gave money to the agent on October 21 for the sole purpose of having the agent "help [him] to prepare and file [his] cabaret tax whenever it comes due * * * [and] to get [his] books properly in order * * *" (R. 111; see *supra*, pp. 11–12).

The unsolicited bribe offered the agent on October 21 makes it clear that when the agent returned three days later, by pre-arrangement, petitioner was already disposed to commit the crime. Not only was the idea then in his mind, but he thought, indeed, that he had already succeeded. Accordingly, there can be no question of entrapment on October 24 if the prior transaction is taken into account.

(b) Even if the events of October 24 are viewed in isolation, neither the government's evidence nor that submitted by petitioner establish entrapment. The fact that the government agent pretended to "play along" with petitioner, and recorded his conversations, does not show illegal inducement to criminal activity. The record of the conversations on October 24 shows that the agent did not initiate discussion of a bribe. All he did was indicate by the tenor of his conversation and his responses to statements made by petitioner that he was receptive to petition-

er's offers in this regard. He simply provided petitioner with the freedom to commit a criminal act. This is not entrapment. At most, it suggests the type of enforcement activity which this Court has recognized as proper and which it has taken pains to distinguish from entrapment. As the Court has said, "Entrapment occurs only when the criminal conduct was the 'product of the *creative* activity' of law-enforcement officials". *Sherman* v. *United States,* 356 U.S. 369, 372 (emphasis in the original). It exists "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells* v. *United States,* 287 U.S. 435, 442. It is not entrapment, however, where all that is shown is governmental "stealth and strategy," *Sherman, supra,* 356 U.S. at 372, which "merly afford opportunities or facilities for the commission of the offense. * * * Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Sorrells, supra,* 287 U.S. at 441.

At the trial, petitioner virtually remained silent concerning the particulars of his meeting with Davis on October 24. He confined himself to general statements to the effect that Davis went over a lot of figures and that he became nervous and upset because he felt that the agent was not there for the purpose for which he had come on October 21, and he described his wife's displeasure on learning that he had given the agent money (R. 114–117). His testimony, in short, did not even suggest entrapment on that

date. The trial judge, in his statement preceding the charge on entrapment, noted that petitioner's counsel had suggested that Davis' estimate of the tax due was inflated so as to induce a bribe (R. 133–134). Petitioner now rests largely on this claim that the government agent made false statements as to the existence of excise tax obligations in his discussions with petitioner on October 24, and argues that these statements constituted the creative genesis of the criminal act. But, from all that appears in the evidence, the agent had every reason to believe that taxes were due. Certainly he had a right to investigate (see Statement, *supra*, pp. 5–6). In any event, petitioner himself never claimed that the agent's statements concerning the amount of past taxes apparently due triggered or induced the bribe offer.

The sum of it is that nothing in either the agent's or petitioner's version of the events even suggests that petitioner's delivery of money to the agent was induced by governmental activity. Entrapment is a belated claim, devised for the argument. It is not in the record of the trial.

(c) Not only did petitioner fail to present evidence at trial suggesting that he was entrapped into crime by the activities of agent Davis, but the defense at trial was the antitheses of an entrapment claim. Petitioner did not admit giving the agent money and making promises to avoid payment of a tax. Nor, of course, did he say he did so under official cajoling and pressure. On the contrary, his trial defense was that his conduct was not criminal. He testified that he never attempted to bribe the agent. His story at

trial was that he offered money and other benefits to Davis as part of a business arrangement, whereby, completely separate from Davis' official status, the agent was to prepare petitioner's tax returns and do whatever else was necessary to put petitioner's books in order (See R. 111–112, 114).

It has been noted that it is an "anomaly" to assert the position of "I didn't do it, but if I did, I was entrapped." *Stein* v. *United States*, 263 F. 2d 579, 581 (C.A. 9). But, whether or not such inconsistent defenses are available where the accused submits supporting evidence on both, and preserves both for appellate review,[10] the contradiction must be weighed against a claim of entrapment belatedly asserted on appeal. *Ramirez* v. *United States*, 294 F. 2d 277, 283 (C.A. 9); see also *Ware* v. *United States*, 259 F. 2d 442, 445 (C.A. 8); *Rodriguez* v. *United States*, 227 F. 2d 912, 914 (C.A. 5); *Eastman* v. *United States*, 212 F. 2d 320, 322 (C.A. 9); *Siglar* v. *United States*, 208 F. 2d 865, 868 (C.A. 5), certiorari denied, 347 U.S. 991. "A defendant may not lie back, take his chance on acquittal on the issue on which he places his main or, as in this case, his sole reliance, and, when that fails, seek to have a judgment of conviction reversed on a ground not pressed on the trial court." *Moore* v. *United States*, 262 F. 2d 216, 218 (C.A.D.C.), certiorari denied, 359 U.S. 959. "[H]e cannot have his cake and eat it too." *Coronado* v. *United States*, 266 F. 2d 719, 721 (C.A. 5). Certainly, under the cir-

[10] See *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C.); *Crisp* v. *United States*, 262 F. 2d 68, 70 (C.A. 4).

cumstances, petitioner was not entitled, as a matter of law, to a judgment of acquittal. See Rule 29(a), Federal Rules of Criminal Procedure, *supra*, p. 3; see also, *Jasso* v. *United States*, 290 F. 2d 671, 673 (C.A. 5), certiorari denied, 368 U.S. 858; *Costner* v. *United States*, 271 F. 2d 261 (C.A. 6), certiorari denied, 362 U.S. 952; *Corbin* v. *United States*, 253 F. 2d 646, 647 (C.A. 10); *Picciurro* v. *United States*, 250 F. 2d 585, 589–590 (C.A. 8); *Ege* v. *United States*, 242 F. 2d 879, 883 (C.A. 9).

B. PETITIONER WAS NOT PREJUDICED BY THE TRIAL COURT'S INSTRUCTIONS

1. The charge was not prejudicially erroneous.

(a) Petitioner criticizes the trial court's entrapment instructions on two grounds (Pet. Br. 26–32). First he says that the Court submitted an incorrect standard to the jury in charging that government agents may take various steps to procure evidence "provided that their participation is not a deliberate temptation to *men of ordinary firmness*" (emphasis added; see *supra*, p. 16); that the proper test, petitioner argues, is whether *he*, not an ordinary person, was entrapped. The claim is without merit. The challenged language was wholly consistent with the statement of this Court in *Sherman* v. *United States*, 356 U.S. 369, 372, that "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," and that approved in *Sorrells* v. *United States*, 287 U.S. 435, 445, that "decoys are not permissible to ensnare the innocent and law-abiding into the commission of crime." In fact, the statement complained of is in sub-

stance identical with the language of the concurring opinion in *Sherman* v. *United States*, 356 U.S. 369 at 378, 384, that agents "should act in such a manner as is likely to induce to the commission of crime only these persons and not others who would normally avoid crime and through self-struggle resist ordinary temptations."

(b) Petitioner's second challenge is that the trial court erroneously instructed that the burden of proof with respect to entrapment falls on the defendant (Pet. Br. 29–30). We do not say that this portion of the charge was a complete or a correct statement of the law. We may concede, *arguendo*, that the better practice is to place only the initial burden of establishing a *prima facie* case on the accused, and then shift the burden to the prosecution.[11] But, in our

[11] There are cases in which an entrapment instruction has been expressly or implicitly approved on appeal even though not couched in terms of burden of proof. See *e.g.*, *Martinez* v. *United States*, 300 F. 2d 9, 10, 11 (C.A. 10); *Marks* v. *United States*, 260 F. 2d 377, 381 (C.A. 10), certiorari denied, 358 U.S. 929; *Chapman* v. *United States*, 271 F. 2d 593, 595 (C.A. 5); *Demos* v. *United States*, 205 F. 2d 596, 599 (C.A. 5), certiorari denied, 346 U.S. 873; *De Marco* v. *United States*, 296 Fed. 667, 669 (C.A. 4), certiorari denied, 265 U.S. 593. But where the issue has been squarely posed, the rule seems to have emerged that there is an initial burden upon the defendant to make a showing of entrapment which, if met, shifts to the government an affirmative obligation to refute the defense by proving a sufficent excuse for the inducement. In *Sherman* v. *United States*, 200 F. 2d 880, 882 (C.A. 2), Judge Learned Hand observed:

"* * * in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity

view, the error, if any, is of no practical importance here.

In the circumstances of this case it could make no difference what formulary language was used. The fact is that petitioner never made a *prima facie* showing of entrapment. Accordingly, it would have been pure fiction for the trial court to instruct the jury that the government had the burden to show that the defendant was ready and willing to commit the offense, for such an instruction would have presupposed, contrary to petitioner's theory of defense, that an offense had been committed and that governmental inducement was claimed.

2. *The trial court, in charging entrapment, gave petitioner more than was his due.*

In view of the absence of evidence suggesting entrapment as an issue, the trial judge might properly have refused to give an instruction on entrapment even it it had been requested. Certainly, the judge was not required to give such a charge on his own motion. See *Landers* v. *United States*, 304 F. 2d 577, 582 (C.A. 5); *United States* v. *Kabot*, 295 F. 2d 848, 854 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Lile*, 290 F. 2d 225, 226 (C.A. 6); *United States* v. *Gironda*, 267 F. 2d 312 (C.A. 2), certiorari

---

to commit the offence. On the first question the accused has the burden; on the second the prosecution has it. * * *"

See, to the same effect, *United States* v. *Masciale*, 236 F. 2d 601, 603 (C.A. 2), affirmed, 356 U.S. 386; *United States* v. *Landry*, 257 F. 2d 425, 428–429 (C.A. 7); *Hansford* v. *United States*, 303 F. 2d 219, 224 (C.A.D.C.); *Ryles* v. *United States*, 183 F. 2d 944, 945–946 (C.A. 10), certiorari denied, 340 U.S. 877.

denied, 361 U.S. 848; *United States* v. *Place*, 263 F. 2d 627, 629–630 (C.A. 2), certiorari denied, 360 U.S. 920; *United States* v. *Waldin*, 253 F. 2d 551, 554–555 (C.A. 3), certiorari denied, 356 U.S. 973; *Costello* v. *United States*, 252 F. 2d 750, 751 (C.A. 5); *Murray* v. *United States*, 250 F. 2d 489, 492 (C.A. 9), certiorari denied, 357 U.S. 932; *Rodriguez* v. *United States*, 227 F. 2d 912, 913–914 (C.A. 5); *United States* v. *White*, 223 F. 2d 674, 676 (C.A. 2), certiorari denied, 350 U.S. 888; *Greatreaks* v. *United States*, 211 F. 2d 674, 677 (C.A. 9).

Under the circumstances, in submitting the issue of entrapment to the jury, the trial judge gave petitioner more than was his due and it ill behooves petitioner, who did not request instruction on the issue, and failed to object to the charge given, now to claim prejudicial error.[12] The plain fact is that *any* charge on entrapment, when none is required, redounds to the benefit of the accused. Petitioner was, in effect, offered a gratuitous second defense, to which he was not entitled. It follows that, whatever errors exist, he cannot have been prejudiced.

At all events, since petitioner neither requested an instruction on entrapment nor took exception to the instruction actually given, and, since the error, if any, is not plainly prejudicial, the claim comes too late. Rule 30, Federal Rules of Criminal Procedure, *supra*,

[12] See, *e.g.*, *United States* v. *Place*, 263 F. 2d 627, 629–630 (C.A. 2), certiorari denied, 360 U.S. 920; *Bruno* v. *United States*, 259 F. 2d 8, 11 (C.A. 9); *United States* v. *Klein*, 108 F. 2d 458, 459 (C.A. 7). Cf. *Conway* v. *United States*, 142 F. 2d 202, 205 (C.A. 9); *Tudor* v. *United States*, 142 F. 2d 206, 208 (C.A. 9).

p. 3; see generally, *Moore* v. *United States*, 262 F. 2d 216, 218 (C.A.D.C.), certiorari denied, 359 U.S. 959; *Cellino* v. *United States*, 276 F. 2d 941, 947 (C.A. 9); *Walker* v. *United States*, 285 F. 2d 52, 57 (C.A. 5); *United States* v. *De Marie*, 226 F. 2d 783, 787 (C.A. 7), certiorari denied, 350 U.S. 966. The rule of *Martinez* v. *United States*, 300 F. 2d 9 (C.A. 10), which also involved a belated complaint about the trial court's failure to instruct as to the burden of proof on the issue of entrapment, seems fully applicable here: "There was no error in the instruction on entrapment which so affected the substantial rights of the defendant as to warrant consideration without an objection." 300 F. 2d at 11.

II

THE AGENT'S TESTIMONY AS TO HIS CONVERSATION WITH PETITIONER ON OCTOBER 24, AND THE RECORDING THEREOF, WERE PROPERLY ADMITTED INTO EVIDENCE

Petitioner's contention that the disclosure of his conversation with Agent Davis by any means—through the agent's testimony or the playing of the recording—violated the Fourth Amendment is without foundation. This feature of the case is governed by *On Lee* v. *United States*, 343 U.S. 747, 754.

There, the defendant was induced to make certain incriminatory statements by an old acquaintance and former employee who, unbeknownst to the accused, had turned informer and carried, concealed, a small microphone which transmitted the confidences to a narcotics agent some distance away. One conversation occurred in the defendant's laundry, the other on the

public street. As to both, the Court held the eavesdropping agent's testimony admissible, though the informer himself did not testify. Here, petitioner in the office of the inn, attempted to bribe a Revenue agent, knowing the agent for what he was, but ignorant of the recording device hidden on his person and unaware of his purpose to reveal the confidences communicated. The parallel between the cases need not be elaborated. What distinctions can be drawn clearly point to the present instance as involving less deception.

Since petitioner does not challenge the decision in *On Lee*,[13] we might rest here. But we deem it appropriate to examine the Fourth Amendment claim more closely. It will appear that the present case involves no invasion of privacy whatever, nor any impropriety in the law enforcement methods employed.

A. THE USE OF THE RECORDING DEVICE WAS, UNDER THE CIRCUMSTANCES, UNOBJECTIONABLE

There is here, as in all such cases, an undefined suggestion that the use of an electronic device in obtaining evidence is somehow improper in itself. Peti-

[13] The *On Lee* decision has never been overruled, modified or otherwise limited by this Court. See *Silverman* v. *United States*, 365 U.S. 505, 508. And it has been uniformly followed by the various courts of appeals which have had occasion to consider it. See *e.g.*, *Anspach* v. *United States*, 305 F. 2d 48, 50–51 (C.A. 10), certiorari denied, 371 U.S. 826; *Todisco* v. *United States*, 298 F. 2d 208, 209–210 (C.A. 9), certiorari denied, 368 U.S. 989; *United States* v. *Kabot*, 295 F. 2d 848, 853 (C.A. 2), certiorari denied, 369 U.S. 803; *United States* v. *Finazzo*, 288 F. 2d 175, 177 (C.A. 6), certiorari denied, 368 U.S. 837; cf. *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861.

8

tioner, it is true, avoids such a bald claim. On the contrary, he expressly says his "real ground of objection" is that "all evidence" of the conversation between himself and the Revenue agent, "whether in the form of testimony of the agent or as recorded in the Minifon," ought to have been suppressed (Pet. Br. p. 35). Yet, only the recording was initially objected to and reiterated references to the Minifon keep alive the notion that the intrusion of the instrument is what taints the law-enforcement activity in this case. The suggestion ought to be put to rest.

The fact is that there is nothing inherently objectionable about the use of a recording device. Such instruments are offensive only when, and to the extent, that the prying of the eyes or ears for which they substitute would be offensive. Under circumstances where it would violate the Fourth Amendment for a human agent to observe or listen, so would it be a violation to photograph, or televise, record or transmit, from the same vantage point. But the instrument is not banned from the area where the live witness is admitted merely because it is more reliable or more accurate, or because it gives unimpeachable testimony. As the Fifth Circuit has said, "the only difference between a person testifying to a conversation which he participated in or overheard and a recording of the conversation is that the recording has the advantage of furnishing trustworthy evidence * * *". *Carnes* v. *United States,* 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861. Indeed, this Court has held that, so long as it does not invade a constitutionally protected area, the de-

tection device may be employed even though it probes secrets beyond the reach of the human eye or ear. See *Olmstead* v. *United States*, 277 U.S. 438; *Goldman* v. *United States*, 316 U.S. 129.

A fortiori, recording devices are not objectionable when, as here, they only duplicate what the live witness sees or hears. Thus, no one would question the legality of photographing, from an exterior vantage point, what the cameraman himself permissibly observes. And, certainly, it does not matter whether the camera is displayed or secreted. Nor does it change the picture if the instrument is assimilated to a second human witness. Is the result different when the recording device is introduced *into* a private sanctuary by an authorized witness who will himself mentally record, and divulge, the same events? We think not.

Indeed, the presence of the authorized human agent already destroys what privacy existed, and it cannot really matter that there are now two witnesses, rather than one. As the Ninth Circuit has said in a similar case, the objection to the instrument amounts to the assertion of a "right to rely upon [the agent's] apparent inability to produce proof beyond his own testimony of the substance of the conversation in which he engaged with [the accused, and] [t]his has little relation to an intrusion upon privacy which is the problem at the heart of the constitutional issues presented by eavesdropping." *Todisco* v. *United States*, 298 F. 2d 208, 210 (C.A. 9), certiorari denied, 368 U.S. 989.

Even if the instrument is equated to a trespasser secretly introduced into the room, no real violation of privacy can result when the eavesdropping is limited to what another already mentally records for subsequent publication. *On Lee*, of course, has settled the question. But the rule is even clearer in a case like this one where the human witness actually testifies and the machine merely repeats and corroborates his narrative.

We conclude with petitioner that the fundamental question here is whether the Revenue agent himself is guilty of such a violation of privacy that his own testimony should have been suppressed. If he is innocent, so is his instrument.

B. THERE WAS NO INVASION OF THE PRIVACY OF PETITIONER'S OFFICE

Focusing on Agent Davis himself, petitioner insists that he obtained access to the Inn's "private" office by "misrepresentation," which vitiated petitioner's acquiescence in using the office for the discussion during which the bribe was offered (Pet. Br., pp. 33, 35, 41, 48). The rejection of this contention in *On Lee* is a sufficient answer here. Indeed, having long since revealed himself as a law enforcement officer, Davis was less guilty of deception than On Lee's old friend, Chin Poy, who approached his comrade "wired for sound" without intimating that he had turned informer. What was said there in rejecting the argument of trespass by representation is applicable here, 343 U.S. at 752–753:

> By the same token, the claim that Chin Poy's entrance was a trespass because consent to his entry was obtained by fraud must be rejected.

> Whether an entry such as this, without any affirmative misrepresentation, would be a trespass under orthodox tort law is not at all clear. See Prosser on Torts, § 18. But the rationale of the *McGuire* case rejects such fine spun doctrines for the exclusion of evidence. * * *"

The fact is that here, as in *On Lee*, "access to the listening post was not obtained by illegal means." 343 U.S. at 753. But, in the present context, the result would be no different if it were otherwise. Under the circumstances, it would not matter if entry had been gained by subterfuge, for the complaint here has nothing to do with the privacy of the locale or the manner in which access to it was obtained. That petitioner's office was a "private" sanctum is beside the point. There was no search of that room, no seizure of anything found there. Nor was the conversation that occurred within those walls in any way connected with the locale. The confidences made to Davis might, just as well, have been divulged in the agent's office, in a neutral enclosure, or even on a street corner. In short, the secrets of the room were not probed. What petitioner objects to is not the invasion of his private office, but the repetition of an unprivileged conversation.

---

[14] In *McGuire* v. *United States*, 273 U.S. 95, 100, this Court held that the fact that officers in the course of a seizure illegally destroyed quantities of liquor did not make illegal the seizure, at the same time, of additional liquor under a search warrant. To the argument that the illegality of the destruction rendered the entry a trespass and tainted the seizure with illegality the court said, "We can impute to the one the illegality of the other only by resorting to a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved."

It follows that all the talk about gaining *entry* by "misrepresentation" is wholly irrelevant here and that reliance on *Gouled* v. *United States*, 255 U.S. 298, and *Silverman* v. *United States*, 365 U.S. 505, which involved physical penetration into protected places, is altogether misplaced.

C. THERE WAS NO OTHER INVASION OF PETITIONER'S PRIVACY

We have just shown that petitioner's office was not violated. Neither was there prying into his private papers. Nor was his person searched. Petitioner can hardly complain that his secret thoughts were unfairly extracted from him, for they were, from the beginning, intended to be put into words, and to be communicated to the very auditor who heard them. We must remember that the evidence sought to be suppressed is not information bearing on petitioner's tax liability, but the very offer of the bribe. And, of course, the idea of bribing a revenue agent necessarily involves communication of that purpose to the agent. Had petitioner maintained silence, no crime would have occurred. There is accordingly no question here of probing secrets that petitioner might have kept to himself.

For much the same reason, this case cannot be likened to calling an eavesdropper as a witness, or to using a recording device, to introduce evidence of a confidential conversation. As we have said, the intent to bribe could be carried out only through communication to the agent, who was the prospective recipient. Petitioner intended the conversation to be private only in the limited sense that he hoped that the agent would never disclose the attempted bribery. Peti-

tioner knew that the agent would keep the communication secret only if he chose to neglect his sworn official duty. The risk of disclosure was always present, regardless of eavesdropping by any third person. Cf. *Rathbun* v. *United States*, 355 U.S. 107.

The logical consequence of petitioner's argument that the agent's testimony of their conversation should have been excluded is that a government official is guilty of misconduct whenever he reveals an offer of a bribe, in court or to law enforcement officials, or even to his own superiors. For the offeror of a bribe always intends the conversation to be confidential, wherever it occurs, and the official to whom the bribe is offered always knows that the offeror intends the secrecy and that he (the offeree) is to some degree misleading the offeror by remaining silent. The Minifon involved no greater intrusion upon any protected interest in privacy. The device merely made a more permanent record of what petitioner intended for the agent's ears, and knew would reach the ears of anyone to whom the agent made disclosure.

D. THERE WAS NO IMPROPER LAW ENFORCEMENT ACTIVITY

Nothing remains of petitioner's claim except the unspoken accusation that the government has engaged in "dirty business." Although the point has little relation to the rights here asserted,[15] we address ourselves to it briefly.

[15] There is here no reliance on the Due Process Clause of the Fifth Amendment and no appeal to the supervisory power of the Court over the federal judicial system.

As we have already shown, there is no basis for the charge that agent Davis was guilty of entrapment. In our view, that puts an end to the claim of unfairness. Neither the agent's feigned acquiescence in the bribery plan, nor the use of the Minifon, can be condemned under the circumstances. Both are necessary and proper ingredients of effective law enforcement.

Indeed, if the agent's relatively innocuous conduct here is found offensive, *a fortiori*, the whole gamut of investigatorial techniques involving more serious deception must also be condemned. Police officers could then no longer employ confidential informants, act as undercover agents, or even wear "plain clothes." Yet, it has been long accepted doctrine that "stealth and strategy are necessary weapons in the arsenal of the police officer," *Sherman* v. *United States*, 356 U.S. 369, 372, and that the use of decoys and other forms of deception are available techniques of law enforcement so long as the stratagem does not amount to the creation of the criminal design. *Sorrells* v. *United States*, 287 U.S. 435, 441; *Grimm* v. *United States*, 156 U.S. 604, 610. "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential." *United States* v. *Rabinowitz*, 339 U.S. 56, 65. Cf. *Olmstead* v. *United States*, 277 U.S. 438, 468.[16]

[16] The cases are legion in which a peaceable stratagem has been recognized as constituting a valid enforcement technique. See, *e.g.*, *Kivette* v. *United States*, 230 F. 2d 749 (C.A. 5), certiorari denied, 355 U.S. 935 (law enforcement officers posing as members of the general public obtained information that the defendant was selling liquor illegally); *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10) (inspector of the United

The conclusion is plain that nothing done here was illegal or outside the bounds of proper law enforcement activity. The fact is that Agent Davis did his job well, and fairly. He needs no discipline. There is accordingly no violation of the strictest exclusionary rules, and no occasion for inventing new "prophylactic" standards.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

DECEMBER 1962.

States Food and Drug Administration, posing as an "outdoorsman", purchased habit forming drugs from defendant who was posing as a physician); *Stein* v. *United States*, 166 F. 2d 851 (C.A. 9), certiorari denied, 334 U.S. 844 (narcotics agents posing as private citizens); *Weathers* v. *United States*, 126 F. 2d 118 (C.A. 5), certiorari denied, 316 U.S. 681 (decoy letter sent by postal inspector); *United States* v. *Spadafora*, 181 F. 2d 957 (C.A. 7), certiorari denied, 340 U.S. 897 (Secret Service agent posed as distributor of counterfeit money); *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5), certiorari denied, 359 U.S. 969 (narcotics agent posing as a purchaser).

U. S. GOVERNMENT PRINTING OFFICE 1962